

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 13,550 FILED

OCT 29 1956

Joseph W. Stewart

MANUEL JOAO COELHO, *Appellant*

CLERK

vs.

HERBERT BROWNELL, JR., *Attorney General of the
United States, Appellee*

**Appeal from the Order of the United States District
Court for the District of Columbia.**

LAWRENCE POTAMKIN
1111 E Street, N.W.
Washington, D. C.

Attorneys for Appellant

J. J. KILIMNIK
2204 Pine Street
Philadelphia 3, Pa.
of Counsel

QUESTIONS PRESENTED

1. Where the sole pleadings before the Court were the complaint and motion for preliminary injunction, can the Court make findings of fact and conclusions of law based on the administrative record not properly before the Court?

2. Is is not a denial of a fair hearing and procedural due process to deny a person the right to testify as to the manner of his illegal arrest without a warrant of arrest, to admit a warrant of arrest without identification and to deny pertinent information within the personal knowledge of the Special Inquiry Officer?

3. Is a search and seizure without a warrant valid where an arrest is made without a warrant of arrest under circumstances lacking the statutory prerequisites for such an arrest and can the fruits of such a search be used, admitted in evidence and form the basis for decision?

4. Is a decision based on reasonable, substantial and probative evidence where appellant is not permitted to testify as to the manner of his illegal arrest without a warrant of arrest, contrary to the requirements of a fair hearing and procedural due process?

5. Does a general delegation of authority to the Attorney General to appoint employees of the Immigration and Nationality Service give the Commissioner of Immigration and Naturalization specific authority to appoint Special Inquiry Officers to conduct hearings under the Act?

INDEX

	Page
Questions Presented	i
Jurisdictional Statement	1
Statement of the Case	2
Statutes Involved	4
Statement of Points	5
Summary of Argument	6
Argument	7
Point I. The sole pleadings before the Court were the complaint and motion for preliminary injunction but the court below made findings of fact and conclusions of law based upon the record of the hearing before the special inquiry officer which was not before the Court.	7
Point II. The hearing was conducted contrary to Section 242(b) (3) of the Immigration and Nationality Act.	8
Point III. The appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a search and seizure warrant.	12
Point. IV. The decision of the special inquiry officer was not based upon reasonable, substantial and probative evidence as required by Section 242(b) (4) of the Act.	17
Point V. There is no specific authority in the Immigration and Nationality Act for appointment of a special inquiry officer by the Commissioner of Immigration and Naturalization.	20
Appendix	23

CITATIONS

<i>Cases:</i>	Page
Bento, Manuel Nunes, A-7948051 (4-5-54) (Board of Immigration Appeals)	9
District of Columbia v. Little, 178 F. 2d 13, affirmed 339 U. S. 1	14
Jefferson v. United States, 187 F. 2d 498, affirmed 342 U. S. 48, 50, 51	14
Marcello v. Bonds, 249 U. S. 303 (1955)	8
Rupino-Soares, Juan, A-10245382 (7-18-56) (Board of Immigration Appeals)	9
St. Joseph Stockyards v. United States, 298 U. S. 38	14
Taylor v. United States, No. 13, 306 (decided Oct. 25, 1956)	16
United States v. Alberti, 120 F. Supp. 171, 173, 174	15, 20
United States v. Blok, 188 F. 2d 1019	14
United States v. Broadway Arrington, 215 F. Supp. 630	15
United States v. 5 Gambling Devices, 199 F. Supp. 641	15, 20
United States v. Office #508 Ricou-Brewster Bldg., 119 F. Supp. 24, 28	15, 20
United States v. O'Rourke, 213 F. 2d 759, 753 ...	15
United States v. Reckis, 119 F. Supp. 687, 690 ..	15, 20
Wrightson v. United States, 223 F. 2d 556	15
 <i>Statutes:</i>	
Administrative Procedure Act, 5 U.S.C. 1001 et seq.	2
Declaratory Judgment Act, 28 U.S.C. 2201	2
Immigration and Nationality Act of 1952	
Section 103(a)	20
Section 242(b) (3)	3, 4, 5, 8, 12
Section 242(b) (4)	4
Section 287(a) (2)	5, 7, 12

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,550

MANUEL JOAO COELHO, *Appellant*

vs.

HERBERT BROWNELL, JR., *Attorney General of the
United States, Appellee*

**Appeal from the Order of the United States District
Court for the District of Columbia.**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the order of the District Court dated August 27, 1956, denying appellant's motion for a preliminary injunction.

Appellant seeks a stay of proceedings pending the termination of his complaint in the form of an action for declaratory judgment and review under the Administrative Procedure Act, declaring the deportation proceedings null and void because of the illegality of his arrest without a warrant of arrest and the illegal seizure of certain docu-

ments without a search and seizure warrant, one of which documents, a record of arrival in the United States, was used and improperly admitted into evidence. Also involved is the failure to afford a hearing in conformance with Section 242(b) (3) of the Act, the lack of due process of law in the apprehension of appellant, the admissibility of a record of sworn statement, the refusal of the special inquiry officer to permit the examination of appellant by his counsel on the manner of his illegal arrest without a warrant of arrest, the lack of specific authority for the appointment of special inquiry officers under the Act, the refusal of the special inquiry officer to furnish information as to the extent of control over him by the District Director and the resultant applicability of the Administrative Procedure Act. Together with the complaint, the appellant filed a motion for preliminary injunction which the Court below denied.

The jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001 et. seq.).

STATEMENT OF THE CASE

Appellant filed a complaint in the form of an action for declaratory judgment and review, alleging that deportation proceedings were instituted against him on the charge that, at the time of his entry, he was an immigrant not in possession of an immigrant visa. At the hearing, an additional charge was lodged against him that he overstayed his leave as a visitor for business. The appellant alleged certain procedural defects, such as the failure to comply with the Administrative Procedure Act in the appointment of a hearing examiner, that there is no specific authority granted to the Commissioner of Immigration and Naturalization or the Attorney General by the Immigration and Nationality Act to appoint special inquiry officers to conduct deportation proceedings and that the hearing

violated Section 242(b) (3) of the Act. Appellant also alleged that the special inquiry officer refused to furnish necessary information as to the identity of his superior officer who rated him, had the power to increase or decrease his salary and affect the conduct of the hearing in any way, or of the person or persons who had the duty of assigning cases to him for hearing.

Appellant also alleged that he was illegally arrested by an immigration officer without a warrant of arrest and that he was illegally searched without a search and seizure warrant as a result of which certain documents were illegally obtained from him from which information was obtained which led to the deportation proceedings. He also alleged that the documents so illegally seized were used at the hearing. One of the documents, a record of arrival, was improperly admitted into evidence. The appellant alleged that his arrest was without due process of law and in violation of the 4th Amendment of the Constitution of the United States. Appellant also alleged that a record of sworn statement was illegally admitted into evidence although no interpreter was present at the time the statement was allegedly obtained and appellant could not fully understand the officer who interrogated him. Appellant was not warned that he need not answer any questions or that any statement he made must be voluntary. The appellant also alleged that the record of sworn statement was prepared by an immigration officer from the documents illegally seized from him. He also alleged that the special inquiry officer improperly excluded testimony of the appellant as to the illegality of the arrest without a warrant of arrest. Appellant alleged that he was compelled to surrender certain documents, to wit, a passport, card of identity, military record and criminal register certificate, to the immigration officer who had no warrant for his arrest and no search and seizure warrant. Appellant alleged that the surrender of these documents was not voluntary and was made while the appellant was in fear of the immigration officer, who was in uniform and armed. He also alleged that

he was deprived of due process of law under the 5th Amendment, and that he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States.

The appellant also filed a motion for preliminary injunction. The District Court below granted a temporary restraining order pending the hearing of the motion for preliminary injunction. The motion was heard by the Court below.

The appellee filed no answer to the complaint and no other pleading. The appellee did file a memorandum in opposition to the appellant's motion for preliminary injunction, to which he attached the Immigration and Naturalization file in the instant case. No offer was made to enter the file into evidence at the time of oral argument.

The Court below made findings of fact and conclusions of law based on the complaint, motion for preliminary injunction and the Immigration and Naturalization file.

STATUTES INVOLVED

Immigration and Nationality Act of 1952, Section 103(a).

Immigration and Nationality Act of 1952, Section 242(b) (3) :

"the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government;"

Immigration and Nationality Act of 1952, Section 242(b) (4) :

"no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

Immigration and Nationality Act of 1952, Section 287(a) (2) :

"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;"

STATEMENT OF POINTS

I. The lower court's findings of fact and conclusions of law were based upon the record of the hearing before the Special Inquiry Officer of the Immigration and Naturalization Service which was not before the Court, since it was not offered in evidence. The sole pleadings and record before the lower court were the complaint and motion for preliminary injunction.

II. The hearing was conducted contrary to Section 242(b) (3) of the Act. When appellant's counsel sought to elicit pertinent information from the Special Inquiry Officer, it was refused. When request was made for the testimony of the arresting officer, it was denied. Appellant was prevented from testifying as to the manner of his illegal arrest without a warrant of arrest. A warrant of arrest was admitted into evidence without identification.

III. The appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a warrant of search and seizure. The prerequisites for an arrest without a warrant did not exist. Absent a valid arrest, the search and seizure was illegal.

IV. The decision of the Special Inquiry Officer was not based upon reasonable, substantial and probative evidence. The refusal of the Special Inquiry Officer to permit appellant's testimony as to the manner of his illegal arrest without a warrant of arrest deprived him of a fair hearing and procedural due process.

V. There is no specific authority in the Immigration and Nationality Act for the appointment of a Special Inquiry Officer by the Commissioner of Immigration and Naturalization. A general delegation of authority to the Attorney General does not include the re-delegation of power to the Commissioner to appoint Special Inquiry Officers.

SUMMARY OF ARGUMENT

The Court erred in denying the preliminary injunction where the sole pleadings before the Court were the complaint and motion for preliminary injunction and the complaint set forth serious allegations of the denial of fundamental constitutional rights.

Due process is denied:

A. Where the special inquiry officer refused to furnish pertinent and relevant information as to the extent and control over him by the District Director;

B. Where the special inquiry officer refused to call the arresting officer as a witness so that he could be examined as to the manner of the illegal arrest and illegal search of the appellant and where he refused to permit counsel to examine the appellant on the manner of his illegal arrest;

C. Where the special inquiry officer improperly restricted counsel in examining the appellant to the sole question as to his voluntary dealings with the Immigration Service;

D. Where the special inquiry officer admitted into evidence a warrant of arrest without identification.

Appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a search and seizure warrant, contrary to the provisions of Section 287(a)(2) of the Immigration and Nationality Act.

The decision of the special inquiry officer was not based upon reasonable, substantial and probative evidence, since the information for the institution of proceedings against appellant was obtained from documents illegally seized from him without a warrant of search and seizure after an illegal arrest without a warrant of arrest.

There is no specific authority in the Immigration and Nationality Act for the appointment of a special inquiry officer by the Commissioner of Immigration and Naturalization.

ARGUMENT

I. The sole pleadings before the Court were the complaint and motion for preliminary injunction but the court below made findings of fact and conclusions of law based upon the record of the hearing before the special inquiry officer which was not before the Court.

The sole pleadings before the Court below were the complaint and motion for preliminary injunction. The Immigration and Naturalization file was not part of the record. No testimony was taken. The findings of fact and conclusions of law of the Court below, based as it was upon the said pleadings and also upon the Immigration and Natu-

ralization file, were procedurally defective. However, should this Honorable Court consider the Immigration and Naturalization file a proper part of the record in this case, then appellant makes the following argument:

II. The hearing was conducted contrary to Section 242(b)(3) of the Immigration and Nationality Act.

A. The special inquiry officer refused to answer pertinent questions by counsel as to the person or persons who rated him, had control over the increase or decrease of his salary, and the person or persons who had the duty of assigning cases to him. These questions were perfectly proper and were consonant with the decision in *Marcello v. Bonds*, 249 U. S. 303 (1955). The determination by the Supreme Court that the special inquiry officer was not under the control of the local District Director was based on the fact that no testimony was offered or presented on that particular issue. Counsel endeavored to elicit information on that point, which the special inquiry officer was particularly competent to furnish. His failure to do so is reversible error.

B. The special inquiry officer refused to call upon the arresting officer to testify as a witness in the case so that counsel for appellant could examine the officer on the manner of the illegal arrest and illegal search of the appellant. He also refused to permit counsel to examine the appellant on the manner of his illegal arrest, but limited the scope of the examination solely to the involuntary character of his dealings with the Immigration Service.

(Pages 4, 5, notes of testimony)

"BY COUNSEL:

May I at this time respectfully request that the officer or officers who served the warrant on the respondent and the officer or officers who initially ar-

rested the respondent and took him into custody be produced as witnesses in this case.

BY SPECIAL INQUIRY OFFICER:

For what purpose?

BY COUNSEL:

For the purpose of questioning them in connection with the arrest of the respondent, which I am informed was made without a warrant of arrest and the respondent was illegally arrested without a warrant of arrest and the respondent was illegally searched without a search and seizure warrant and certain documents taken from him which led to the institution of these proceedings.

BY SPECIAL INQUIRY OFFICER:

Testimony intended to prove the illegality of the arrest in my opinion, is immaterial and will not be received."

It is respectfully submitted that this action was directly contrary to the decision of the Board of Immigration Appeals in the case of *Manuel Nunes Bento*, A-7948051, decision dated April 5, 1954, where the Board stated: "... denial of opportunity to question the respondent relative to the manner in which he was arrested ... is prejudicial because otherwise counsel would be unable to lay the foundation of alleged illegality in the arrest of the respondent".

The Board has recently reiterated its position on this particular point in the matter of *Juan Rupino-Soares*, A-10245382, in its decision dated July 18, 1956. However, the Court's attention is called to the fact that the Attorney General overruled the Board and held that the restriction was proper.

C. The special inquiry officer restricted counsel in examining the appellant to the sole question as to his voluntary dealings with the Immigration Service.

(Pages 11, 12, notes of testimony)

"COUNSEL TO RESPONDENT:

Q. Mr. Coelho, do you remember the time when you were arrested by the immigration officers, when you were first arrested? A. I do.

Q. Where were you at that time? A. At work.

Q. Where? A. In Silver Creek.

Q. In what state? A. New York.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Q. Mr. Kilimnik, will you state briefly, what you offer or intend to prove by this line of testimony? A. Yes, Mr. Speiser. I offer to prove by the respondent that he was illegally arrested without a warrant of arrest and that he was illegally searched without a search and seizure warrant and that as a result of this illegal search certain documents were obtained from the respondent by the immigration officers to the respondent without a warrant of arrest which led to the institution of these proceedings—in these deportation proceedings against him.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Q. Well, it is my ruling that all questions relating to the illegality of arrest, in and of itself, is immaterial and will be excluded. However, I shall permit questions which are designed expressly to establish that any of the actions of the respondent in his dealings with immigration officers, was involuntary. Do you understand the nature of my ruling? A. Yes sir. I presume sir, that your ruling would cover any question of voluntary action in this part from the moment when he was taken

into custody and arrested up until . . . covering the exclusion of these documents.

BY SPECIAL INQUIRY OFFICER:

I wish to point out that the mere fact, if established that his arrest was illegal, that fact is irrelevant to these proceedings, but you may question the respondent regardless of the illegality of the arrest, to establish that any actions on his part in dealing with Service officers, were involuntary."

This was an unwarranted restriction contrary to Section 242(b) (3) of the Act.

D. The special inquiry officer admitted into evidence a warrant of arrest without identification.

(Pages 1, 2, notes of testimony)

**"SPECIAL INQUIRY OFFICER TO RESPOND-
ENT:**

Q. I show you a warrant of arrest issued by this Service on November 2, 1955 and ask you whether a copy of this warrant was delivered to you on or about the date mentioned? A. Yes.

Q. Mr. Coelho, this warrant charges that you are liable to deportation from the United States because at the time of your entry on July 15, 1955 you were an immigrant not in possession of immigrant visa or other equivalent document. Do you understand the nature of the charge contained in the warrant of arrest? A. Yes, I understand.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Q. Mr. Kilimnik, is there any objection to the receipt of this warrant in evidence? A. Yes, I object to the receipt and the admission in evidence of this warrant unless the officer or officers who served the warrant and the officer or officers who initially took

the respondent in custody and arrested him be produced as witnesses in this case.

BY SPECIAL INQUIRY OFFICER:

The objection is overruled and the warrant will be received in evidence and marked *EXHIBIT # 1.*"

This was contrary to Section 242(b) (3) of the Act in that no witness was presented to identify the document.

III. The appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a search and seizure warrant.

While the record is incomplete because of the restriction by the special inquiry officer upon counsel's right to examine the appellant on the manner of his illegal arrest, it is undisputed that the appellant was arrested without a warrant of arrest. There is nothing of record to indicate that the prerequisites for the arrest without a warrant were present in this particular case. These prerequisites are set forth in Section 287(a) (2) of the Immigration and Nationality Act, which provides as follows:

"Sec. 287(a). Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

* * * * *

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his delay for examination before an officer of the Service having authority

to examine aliens as to their right to enter or remain in the United States;"

However, there is no evidence that the appellant's presence at the place of his arrest provided the necessary prerequisites contained in that section for a valid arrest without a warrant. On the contrary, the appellant's testimony shows no basis for his arrest without a warrant.

The appellant did not, in the presence or view of the officer, enter or attempt to enter the United States in violation of any law or regulation, nor did the officer, at the time he first saw the appellant, have any knowledge or have reason to believe that the appellant was in the United States in violation of any law or regulation and was likely to escape before a warrant could be obtained.

Lacking these prerequisites to an arrest without a warrant, the officer had no authority to make such an arrest under the circumstances.

It is contended with equal vigor that appellant's arrest without a warrant being illegal, the obtaining of the documents from the appellant in the manner testified to by him was in violation of the 4th Amendment of the Constitution of the United States.

The 4th Amendment of the Constitution of the United States provides:

"the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is to be noted that the right referred to in the Amendment pertains to "the people", not merely to citizens. The protection of this right should therefore be accorded to non-citizens as well.

The circumstances of this arrest indicated a clear violation of constitutional rights. As the Court said in *St. Joseph Stockyards v. The United States*, 298 U. S. 38, at page 52:

"But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place these rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. The principle applies when rights either of persons or property are protected by constitutional restrictions."

The provisions of the 4th Amendment regarding searches precludes searches by Government officers without a warrant, regardless of whether the officers are searching for evidence of crime or whether they are searching for something else or just searching. *District of Columbia v. Little*, 178 F. 2d 13, affirmed 339 U. S. 1.

In *United States v. Blok*, 188 F. 2d 1019, a search of a Government clerk's desk by police without a warrant of arrest and without a search and seizure warrant was held to be in violation of the 4th Amendment.

In *Jefferson v. United States*, 187 F. 2d 498, the rule denying the use of evidence seized in the course of a search made without warrant was re-affirmed. In affirming the opinion of the Court of Appeals, the Supreme Court in 342 U. S. 48, 50, 51 said:

"We agree with the Court of Appeals that the seizure was made in violation of the 4th Amendment and on motion of plaintiff its fruits should have been excluded as evidence on his trial.

The 4th Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection

extends to both 'houses' and 'effects'. Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes."

"Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure."

Aliens, so long as they are permitted to remain in the United States, are entitled to the protection of its Constitution and laws with respect to their rights of person and of property and to their civil and criminal responsibility. *United States v. O'Rourke*, 213 F. 2d 759, 763. These rights include the right to freedom from illegal search and seizure under the Fourth Amendment of the Constitution of the United States, which may be asserted in civil as well as criminal cases.

Other cases on this subject are *United States v. Broadway Arrington*, 215 F. Supp. 630 and *Wrightson v. United States*, 222 F. 2d. 556.

Whether or not there was a waiver of the constitutional privilege against search and seizure is a question of fact to be determined by the Court. There was no consent on the part of the plaintiff to this interrogation and there was certainly no waiver of his constitutional privilege against an unlawful search and seizure of any personal document or documents. *United States v. 5 Gambling Devices*, 119 F. Supp. 641; *United States v. Office #508 Riccu-Brewster Bldg.*, 119 F. Supp. 24, 28; *United States v. Reckis*, 119 F. Supp. 687, 690; *United States v. Alberti*, 120 F. Supp. 171, 173, 174.

The appellant was arrested while at work. A statement (record of sworn statement) was taken from him on November 1, 1955. (Page 6, notes of testimony)

"Special Inquiry Officer to Respondent:

Q. I am showing you a record of a sworn statement which appears to have been made under oath on November 1, 1955, and ask you whether you signed this document?"

A warrant of arrest was not issued until November 2, 1955 (p. 11, supra.), the day after he had been taken into custody. No search warrant was issued. There is no evidence to indicate why the officer arrested appellant without a warrant since the appellant was not permitted to testify on that point and the officer who made the arrest did not appear and testify.

The factual situation is most similar to *Valerio v. Mulle, Acting District Director, Immigration and Naturalization Service*, Civil Action No. 18279, United States District Court, Eastern District of Pennsylvania, where the Honorable Allen R. Grim denied the government's motion for summary judgment. (Appendix 36).

A similar ruling was made in *Costa v. Mulle, Acting District Director, Immigration and Naturalization Service*, Civil Action No. 18280, United States District Court, Eastern District of Pennsylvania, by Judge Grim under a similar factual situation.

A contrary ruling was made in the case of *Diogo v. Zimmerman, District Director, Immigration and Naturalization Service*, Civil Action No. 16680, United States District Court, Eastern District of Pennsylvania, by the Honorable George A. Welsh. (Appendix 39).

The denial of constitutional rights raise substantial questions which require hearing and adjudication. There was no waiver of these rights in the instant case and the presumption is against such a waiver. This Honorable Court, on October 25, 1956, held in the case of *Taylor v. United States*, No. 13, 306, that:

"There is to be borne in mind the admonition of the Supreme Court that 'courts indulge every reasonable

presumption against waiver' of 'fundamenall constitutional rights' and that 'we do not presume acquiescence in the loss of fundamental rights.' *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)."

In another case involving the allegation of the denial of fundamental constitutional rights (*Juan Pineiro-Lopez v. Herbert Brownell, Jr.*, Civil Action No. 3663-56, United States District Court for the District of Columbia) although the Immigration and Naturalization record did not show the denial of such rights, the Honorable Matthew F. McGuire, United States District Judge for the District of Columbia, on September 15, 1956, referred the case back to the Immigration Service for the resolution of the question of fact with reference to the manner of arrest, saying:

"It is paying tribute to shadow and ignoring substance, when slavish obeisance is made to technical procedural requirements, when basic constitutional safeguards are challenged as not only being ignored but entirely absent."

IV. The decision of the special inquiry officer was not based upon reasonable, substantial and probative evidence as required by section 242(b)(4) of the Act. (P. 4, supra).

The refusal of the special inquiry officer to permit the examination of the appellant as to the manner of his illegal arrest without a warrant of arrest deprived the appellant of a fair hearing and denied him procedural due process. From the limited evidence available, it would appear that his arrest without a warrant had no support from Section 287(a). The seizure of the documents from the appellant clearly indicated that handing over the documents was not a voluntary act.

(Pages 13, 14, notes of testimony) :

"COUNSEL TO RESPONDENT:

* * * * *

Q. You went to your house and what happened there?

A. He ordered me to open up my suitcases and to give him the papers which I had there.

Q. Did you do that? A. Yes, we had to do it.

* * * * *

Q. What papers did you give to the officer? A. My passport, my card of identity, a card of identity issued by the military authorities and a certificate of the criminal register.

* * * * *

Q. Would you have given any of these documents to the officer if he were not an officer of the law? A. Well, I could do nothing about that because I was before the authority, the authority with the pistol.

Q. By that do you mean that officer had a pistol in his possession—on his person? A. Yes, he had a pistol.

Q. Was that pistol visible to you? A. Yes, sir.

Q. Was the officer dressed in uniform or plain clothes? A. In uniform.

Q. Did you give these documents to the officer of your own free volition? A. Well, I didn't give him the documents voluntarily. I was afraid.

Q. Would you have permitted the officer to enter your house with you if he was not an officer of the law? A. No.

Q. Did the officer, at any time from the time that you first saw him until—from the time you first saw him, show you any warrant for your arrest? A. No.

Q. Did the officer, at any time from the time you first saw him, show you a warrant of search and seizure authorizing him to take any documents or other property from you? A. No."

With respect to the record of sworn statement, the appellant testified (page 14, notes of testimony) that he

was shown some papers and told to sign them by the immigration officer.

"COUNSEL TO RESPONDENT:

* * * * *

Q. What happened at the immigration office? A. We were told about posting bond; we were shown some papers, and after these papers were prepared we were told 'Sign here' by this police officer. After that we were allowed to go free."

He also testified that the officer who took the statement obtained some of the information from the papers which were illegally seized from him.

(Page 15, notes of testimony)

"COUNSEL TO RESPONDENT:

Q. Do you remember at the time when you were asked these questions which appear on EXHIBIT #3, whether the officer looked at this document, and I am referring to EXHIBIT #2, and your passport, before he filled in the answers to the questions? A. Yes."

The special inquiry officer admitted into evidence form 257, record of arrival.

(Page 6, notes of testimony)

"BY SPECIAL INQUIRY OFFICER:

This Form 257 indicates that Manuel Joao Coelho was admitted to the United States at the Port of New York on July 15, 1955 for business, a period to expire July 30, 1955. The reverse of this document indicates that his stay was thereafter extended until October 2, 1955. The document is received in evidence and marked EXHIBIT #2."

BY COUNSEL:

I object to the admission of this document as evidence on the ground that this document was ob-

tained by the immigration officer who initially took the respondent into custody and arrested him and illegally obtained this document without a warrant of arrest and without a warrant of search and seizure.

BY SPECIAL INQUIRY OFFICER:

Objection is overruled. The document has been received in evidence and marked EXHIBIT #2."

This was a violation of the appellant's rights under the 4th Amendment of the Constitution.

It is, therefore, respectfully submitted that the decision of the special inquiry officer, based as it was upon the record of arrival illegally seized by the immigration authorities, and the sworn statement, which was composed of information obtained from other documents illegally seized from the appellant, was not based upon reasonable, substantial and probative evidence, as required by Section 242(b) (4). *United States vs. 5 Gambling Devices*, supra; *United States vs. Office #508 Ricou-Brewster Bldg.*, supra; *United States vs. Reckis*, supra; *United States vs. Alberti*, supra.

V. There is no specific authority in the Immigration and Nationality Act for appointment of a special inquiry officer by the Commissioner of Immigration and Naturalization.

It is respectfully submitted that there is no specific authority in the Immigration and Nationality Act which grants the Commissioner of Immigration and Naturalization the power to appoint special inquiry officers, other than the general authority granted to the attorney general in Section 103(a):

"To appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer

or employee of the Department of Justice in his discretion any of the duties and power imposed upon him in this Act."

Nothing in the quoted section grants specific authority to the Commissioner of Immigration and Naturalization to himself appoint special inquiry officers to conduct deportation hearings. In the absence of this specific authority, the only basis for any officer of the Immigration and Naturalization Service to conduct deportation hearings would be an appointment as an examiner under the provisions of the Administrative Procedure Act.

It is, therefore, respectfully submitted that the proceedings should be remanded to the Immigration and Naturalization Service in order that a full and fair hearing be accorded to the appellant, and that a stay of proceedings should be granted pending this action.

Respectfully submitted,

LAWRENCE POTAMKIN,

Attorney for Appellant

JACOB J. KILIMNIK,

Of Counsel.

APPENDIX

INDEX

	Page
Petition for Stay of Proceedings.....	23
Complaint	27
Motion for Preliminary Injunction and Affidavit	33
Findings of Fact and Conclusions of Law	34
Order	35
Opinion (Grim, J.—U.S.D.C., E.D. of Pa.)	36
Opinion (Welsh, J.—U.S.D.C., E.D. of Pa.)	39

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 13,550

MANUEL JOAO COELHO, *Appellant*

vs.

HERBERT BROWNELL, JR., *Attorney General*
of the United States, Appellee

Appeal from the Order of the United States District Court
for the District of Columbia.

PETITION FOR STAY OF PROCEEDINGS

**TO THE HONORABLE, THE JUDGES OF SAID
COURT:**

The petition of Manuel Joao Coelho, by his attorney,
Lawrence Potamkin, respectfully represents:

1. That your appellant filed action for declaratory judgment under the Declaratory Judgment Act and for review under the Administrative Procedure Act of the deportation order issued by Edw. J. Shaughnessy, District Director, Immigration and Naturalization Service, New York, New York, acting under the direction and control of the appellee, Herbert Brownell, Jr., Attorney General of the United States;

2. That the said action was filed by reason of the order by the said Edw. J. Shaughnessy, District Director, Immigration and Naturalization Service, New York, New York, that the appellant report to the New York Office of the Immigration and Naturalization Service for deportation on August 20, 1956;

3. That in conjunction with the action for declaratory judgment and review, appellant filed a motion for preliminary injunction, restraining the appellee from deporting the appellant, pending determination of said action;

4. That on August 17, 1956, the Honorable Burnita Shelton Matthews granted appellant's oral motion for a temporary restraining order pending hearing of the motion for preliminary injunction;

5. That on August 27, 1956, the Honorable Edward M. Curran dismissed the motion for preliminary injunction;

6. That on September 5, 1956, appellant filed a notice of appeal from the order dismissing the motion for preliminary injunction and the said appeal was docketed in the office of the Clerk of the Court of Appeals on September 20, 1956;

7. That the defendant has filed no answer to the complaint and no other pleadings;

8. That no testimony was taken by the Court at the time of the hearing, nor was any document or record of any kind submitted;

9. That a copy of the complaint is attached hereto and marked "Exhibit A";

10. That in addition to certain procedural defects in the conduct of the proceedings alleged in the complaint, the following additional allegations are made:

(a) That the appellant was illegally arrested without a warrant of arrest and illegally searched without a search and seizure warrant, as a result of which a certain document was illegally obtained and used and admitted into evidence at the administrative hearing afforded the appellant;

(b) That a record of an alleged sworn statement of the plaintiff was introduced in evidence, although the appellant had testified that there was no interpreter

and that he could not fully understand the immigration officer who interrogated him, nor was he warned that any statement he made must be voluntary;

(c) That the record of alleged sworn statement was prepared by the immigration officers from the document illegally seized from the appellant;

(d) That the special inquiry officer improperly excluded testimony of the appellant as to the illegality of his arrest without a warrant of arrest;

(e) That the appellant was unlawfully compelled to surrender certain documents to the immigration officer arresting him at a time when the appellant was in fear of said officer;

(f) That appellant was deprived of due process of law because he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States;

(g) That all of said questions raised in appellant's complaint are substantial and require determination by the Court;

(h) That unless this Honorable Court grants a stay of proceedings pending the determination of the action for declaratory judgment and review under the Administrative Procedure Act in this appeal, the appellant will be deported from the United States.

WHEREFORE, appellant respectfully prays this Honorable Court to grant a stay of proceedings in the above case, restraining the appellee, Herbert Brownell, Jr., Attorney General of the United States, and his subordinates, from deporting the appellant pending the determination of this appeal.

And your appellant will ever pray, etc.

/s/ LAWRENCE POTAMKIN
Attorney for Appellant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 3428-56

ACTION FOR DECLARATORY JUDGMENT
AND REVIEW

MANUEL JOAO COELHO, *Plaintiff*
6 West 2nd Street

vs.

HERBERT BROWNELL, JR., *Attorney General*
of the United States, Defendant

COMPLAINT

The plaintiff, by his attorneys, respectfully alleges:

1. That this is an action for declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001 et seq.).

2. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be deported from the United States.

3. That deportation proceedings were instituted against the plaintiff on the charge that, at the time of entry, plaintiff was an immigrant not in possession of an immigrant visa, or other equivalent document. At the hearing, an additional charge was lodged against plaintiff that, under Section 241 (a) (2) of the Immigration and Nationality Act, after his admission to the United States as a visitor for business, pursuant to Section 101(a) (15) (B) of the Act, he remained in the United States for a longer period than authorized.

4. That a hearing was held on March 16, 1956, at New York City, New York, before Special Inquiry Officer Reuben Speiser, at the conclusion of which the Special Inquiry Officer found that the plaintiff was not subject to deportation on the ground that he did not have an immigrant visa at the time of his entry, but that he was subject to deportation on the ground that after his admission as a visitor for business, he remained in the United States for a longer period than authorized, and, thereupon, the said Special Inquiry Officer entered an order that the plaintiff be deported from the United States.

5. That the plaintiff's appeal from the said order of the Special Inquiry Officer was dismissed by the Board of Immigration Appeals on May 25, 1956.

6. That all administrative proceedings have been finally concluded.

7. That the deportation hearing granted to the plaintiff was conducted by a Special Inquiry Officer not appointed as an Examiner in conformity with the Administrative Procedure Act and the said Special Inquiry Officer was subject to the control of superior officers including the District Director who engaged in prosecuting and investigatory functions.

8. That Section 11 of the Administrative Procedure Act provides for the appointment of qualified Examiners by the Civil Service Commission.

9. That the plaintiff believes and, therefore, avers that the Special Inquiry Officer who conducted the within proceedings in the Immigration and Naturalization Service was not appointed and qualified by the Civil Service Commission as an Examiner under Section 11 of the Administrative Procedure Act.

10. That the hearing conducted by the said Special Inquiry Officer in violation of Section 11 of the Adminis-

trative Procedure Act diminished the constitutional right of the plaintiff contrary to Section 12 of said act.

11. That the aforesaid hearing was unfair because of failure to comply with the Administrative Procedure Act.

12. That the hearing afforded the plaintiff was in violation of Section 242(b) (3) of the Immigration and Nationality Act of 1952.

13. That the Special Inquiry Officer refused to furnish necessary information as to the identity of his superior officer, or the identity of his superior officer who had the authority to rate him, increase or decrease his salary and affect the conduct of the hearing in any way, or of the person or persons who had the duty of assigning cases to him for hearing. This information was vitally necessary to the plaintiff in order to determine the extent of the control exercised by the District Director or any other officer over the Special Inquiry Officer in the conduct of his hearings.

14. That the plaintiff was illegally arrested by an Immigration Officer without a warrant of arrest.

15. That the plaintiff was illegally searched, in violation of the Fourth Amendment of the Constitution of the United States, and certain documents were illegally taken from him without a search and seizure warrant, as the result of which information was obtained which led to the present deportation proceedings. The documents so illegally seized were used at the hearing by the Examining Officer.

16. That the Arresting Officer failed to obtain a formal warrant of arrest and a warrant of search and seizure in order to lawfully conduct a search of the plaintiff and his residence.

17. That the plaintiff's arrest was without due process of law and in violation of the Fourth Amendment of the Constitution of the United States.

18. That there is no specific authority granted to the Commissioner of Immigration and Naturalization or the Attorney General by the Immigration and Nationality Act of 1952 to appoint Special Inquiry Officers for the purpose of hearing deportation proceedings, and the hearings conducted by a Special Inquiry Officer appointed by the Commissioner of Immigration and Naturalization were, therefore, null and void.

19. That the Special Inquiry Officer used and admitted into evidence Form 257, record of arrival in the United States, although this document was illegally obtained by the Arresting Officer without a warrant of arrest and without a search and seizure warrant.

20. That the Special Inquiry Officer improperly admitted into evidence a record of an alleged sworn statement of the plaintiff although no interpreter was present and plaintiff could not fully understand the officer who interrogated him. The plaintiff was not warned that he need not answer any questions or that any statements he made must be voluntary, all of which was contrary to the Fifth Amendment of the Constitution of the United States.

21. That the Special Inquiry Officer improperly cross-examined the plaintiff on matters not developed in direct examination.

22. That the alleged record of sworn statement was prepared by the Immigration Officers from documents illegally seized from the plaintiff without warrant or arrest and without a search and seizure warrant. The officer was in uniform and armed.

23. That the Special Inquiry Officer improperly excluded testimony of the plaintiff as to the illegality of his arrest without a warrant of arrest.

24. That the plaintiff was unlawfully compelled to surrender certain documents, to wit, a passport, card of

identity, military record and criminal register certificate, to the Immigration Officer, who had no warrant for plaintiff's arrest and no search and seizure warrant. The surrender of said documents was not voluntary and was made while the plaintiff was in fear of the Immigration Officer who was in uniform and armed.

25. That the plaintiff was deprived of due process of law, under the Fifth Amendment of the Constitution of the United States, in that he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that the hearing herein was unfair, null and void;

(b) Declaring that the deportation order herein was null and void;

(c) Restraining the defendant from deporting the plaintiff;

(d) Declaring that the plaintiff was illegally arrested without a warrant of arrest;

(e) Declaring that the plaintiff was illegally searched without a search and seizure warrant and certain documents illegally taken from him contrary to the Fourth Amendment of the Constitution of the United States; declaring that one of said documents was improperly used and admitted in evidence at the hearing.

(f) Declaring that the failure to conduct the hearing pursuant to the provisions of the Administrative Procedure Act made the hearing null and void;

(g) Declaring that the conduct of the hearing by a Special Inquiry Officer not qualified or appointed under the Administrative Procedure Act was a nullity;

(h) Declaring that there is no specific authority granted by the Immigration and Nationality Act of 1952 to the Commissioner of Immigration and Naturalization or the Attorney General to appoint Special Inquiry Officers to conduct deportation proceedings and the hearing conducted by a Special Inquiry Officer appointed by the Commissioner of Immigration and Naturalization was therefore null and void;

(i) Declaring that plaintiff was deprived of due process of law, under the Fifth Amendment of the Constitution of the United States, in that he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States;

(j) Declaring that the alleged sworn statement of plaintiff was not a voluntary statement made by him and was obtained from him while he was in fear of the Immigration Officer who was in uniform and armed;

(k) Declaring that the refusal of the Special Inquiry Officer to furnish the plaintiff with necessary and important information as to the officer or officers who exercised control over him was a denial of due process of law; and

(l) For such other and further relief as may be appropriate.

/s/ LAWRENCE POTAMKIN

Attorney for Plaintiff

JACOB J. KILIMNIK
Of Counsel

MOTION FOR PRELIMINARY INJUNCTION

The plaintiff, by his attorney, moves the Court for an order granting a preliminary injunction against the defendant, restraining the defendant from apprehending and deporting plaintiff pending determination of this suit, upon the grounds and in accordance with the averments set forth in the complaint.

/s/ LAWRENCE POTAMKIN

Attorney for Plaintiff

JACOB J. KILIMNIK

Of Counsel

AFFIDAVIT

DISTRICT OF COLUMBIA: :
WASHINGTON, D. C. : : ss

J. J. KILIMNIK, being duly sworn, according to law, deposes and says:

1. That he is Of Counsel for the plaintiff in the above entitled action;
2. That, as more fully appears from the complaint filed herein, a final order of deportation has been entered;
3. That the defendant, through his subordinates, has advised the plaintiff that he should report for deportation at the New York Immigration Office on Monday, August 20, 1956, at 9:30 A. M., in complete readiness for deportation;
4. That the plaintiff has never been in conflict with the law, is not a member of any subversive organization. During the entire immigration proceedings, plaintiff has been at liberty on bond. If plaintiff is deported, it will result in irreparable damage and injury to him.

/s/ J. J. KILIMNIK.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for consideration on the plaintiff's motion for a preliminary injunction and the Court having considered the motion with attached affidavit, the opposition thereto, the file of the Immigration and Naturalization Service relating to the plaintiff, File No. A-8839362, the complaint filed herein, and argument of counsel, the Court states its findings of fact as follows:

FINDINGS OF FACT

1. The plaintiff is a native and citizen of Portugal who entered the United States on July 15, 1955 as a visitor for business. He was admitted until July 30, 1955 and thereafter received an extension of stay until October 2, 1955.

2. On March 16, 1956 after a hearing it was concluded that the plaintiff was subject to deportation under the provisions of Section 241(a)(2) of the Immigration and Nationality Act in that after his admission to the United States as a visitor for business he remained in the United States for a longer period than authorized.

3. At the deportation hearing the plaintiff did not contest his deportability but applied for voluntary departure at his own expense in lieu of deportation.

4. The plaintiff was granted voluntary departure at his own expense in lieu of deportation.

5. The plaintiff did not voluntarily depart the United States.

6. The defendant has ordered the plaintiff deported.

7. In this action the plaintiff does not contest his deportability.

The Court states its conclusions of law as follows:

1. The plaintiff is subject to deportation under the provisions of Section 241(a) (2) of the Immigration and Nationality Act in that after his admission to the United States as a visitor for business pursuant to Section 101(a) (15) (b) of the Act he remained in the United States for a longer period than authorized.

2. The plaintiff is not entitled to a preliminary injunction.

/s/ EDWARD M. CURRAN

Judge

August 27, 1956

ORDER

This cause having come on for consideration on the plaintiff's motion for a preliminary injunction and the Court having considered the motion with attached affidavit, the opposition thereto, the file of the Immigration and Naturalization Service relating to the plaintiff, File No. A-8839362, the complaint filed herein, and argument of counsel it is by the Court this 27th day of August 1956

ORDERED that the plaintiff's motion for preliminary injunction be and the same hereby is denied.

/s/ EDWARD M. CURRAN

Judge

OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION No. 18279

MANUEL GUERREIRO VALERIO, *Plaintiff*

vs.

HENRY L. MULLE, *Acting District Director, Immigration
and Naturalization Service, Defendant*

GRIM, J.

October 22, 1956

Plaintiff, an alien, is being held for deportation to his native country. He was arrested and given a hearing before a Special Inquiry Officer of the Immigration and Naturalization Service. The Inquiry Officer ordered him to be deported. He appealed to the Board of Immigration Appeals, which sustained the order of the Inquiry Officer. He has filed this action requesting (1) a declaratory judgment in his favor, (2) a review under the Administrative Procedure Act and (3) an injunction restraining the defendant from deporting him. Defendant has filed a motion for summary judgment in his favor.

No hearing has been held in this court, nor have any affidavits been submitted. The facts in the case have been developed from the testimony which was elicited at the hearing before the Special Inquiry Officer.

Plaintiff entered the United States on April 15, 1953, as a visitor for business, and not as an immigrant, with permission to remain in the United States for a period of three months. No extension of this permission has been granted. Consequently, it is clear that plaintiff is in the United States without permission and is subject to deportation. Because of this defendant contends that summary judgment should be entered in his favor.

Plaintiff does not contend that he is in this country validly, but he contends that the motion for summary judgment against him should be denied because of alleged procedural defects in the deportation proceedings, one of the alleged defects being that plaintiff was arrested without a warrant.

The facts of plaintiff's arrest are: On April 22, 1954, plaintiff was approached by two immigration officers while he was working at his job as a laborer and asked by them when he entered the United States. They also asked him for his "documents." Plaintiff told them that he did not have his "documents" with him, but that they were in the room in which he lived. The officers and plaintiff then proceeded together to plaintiff's room where plaintiff gave them his passport. The officers immediately put him under arrest. No warrant for plaintiff's arrest was issued until April 23, 1954, which was the day after he had been taken into custody. No search warrant has ever been issued.

It is provided in the Immigration and Nationality Act of 1952 that an immigration officer without a warrant is authorized: (8 U.S.C.A. Sec. 287(a)(2))

" . . . to arrest any alien within the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest. . . ."

The officers clearly had a right to arrest plaintiff without a warrant if they had reason to believe (as evidently they did) that he was in the United States in violation of the immigration laws and if it reasonably appeared to them that he might escape before a warrant could be obtained. The evidence in respect to why the officers arrested without a warrant is not very clear. The only witness at the hearing before the Inquiry Officer was the plaintiff. Neither of the arresting officers testified. There is nothing to indicate

that plaintiff would have escaped if the officers had not made the arrest until after they had obtained a warrant. Under the circumstances it would be unwise to grant defendant's motion for summary judgment without ordering a hearing in the case, at least to look into the question as to why the arresting officers made the arrest a day before they obtained a warrant.

A defect in the original arrest of an alien will not necessarily void a deportation proceeding. *United States ex rel. Bilokumsky v. Tod*, 263 U. S. 149, 158, *D'Agostino v. Shali*, 230 F. 2d 668, 671. However, it should be remembered that aliens in the United States are entitled to the protection of its constitution and laws with respect to their rights of person and property and they are entitled to this protection under certain circumstances, in both criminal and civil proceedings against them. *Fong Yue Ting v. United States*, 148 U. S. 698, 724, *United States v. O'Rourke*, 213 F. 2d 759, 763.

To support his motion for summary judgment defendant relies on the case of *Tsimouris v. Holland*, 228 F. 2d 907, 132 F. Supp. 754 (Judge Clary). The *Tsimouris* case is quite similar to the present case but it is distinguishable in that in the *Tsimouris* case the facts do not show that the alien was arrested a substantial time before a warrant of arrest was obtained. Besides, unlike the present case, a hearing had been held before the court in the *Tsimouris* case, thereby giving the court a good opportunity to obtain all the facts of the case including the manner in which the arrest was made.

Defendant's motion for summary judgment in his favor will be denied.

/s/ ALLAN K. GRIM, J.

OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION No. 16680

JOSE DIOGO, *Plaintiff*

vs

KARL I. ZIMMERMAN, *District Director,*
Immigration and Naturalization Service, Defendant.

WELSH, J.

September 26, 1956

This complaint is for review under the Administrative Procedure Act, 5 U. S. C. Section 1001 et seq., and for declaratory judgment under the Declaratory Judgment Act, 28 U. S. C. Section 2201. Defendant's motion for summary judgment is presently before the Court.

On December 13, 1951, plaintiff was working in Chester, Pennsylvania, on a bridge construction job for the Berlante Construction Company. In the afternoon of said day, he was called to the superintendent's office together with a fellow employee who could speak both English and Portuguese. A gentleman who identified himself as a member of the Immigration Service then interrogated the plaintiff as to the date and facts surrounding his entry into the United States. After a short interval, the Immigration Officer asked the plaintiff to accompany him to the plaintiff's hotel room. The Immigration Officer and the plaintiff were accompanied at all times by the fellow employee, Jose Texeira, who acted as interpreter, the plaintiff being unable to speak English. The Officer took both men in the Officer's car to the hotel where the plaintiff then resided.

The plaintiff opened the door to his room and walked in followed by the other two men and was told by the Officer to change his clothes and pack his belongings, that

he was leaving for Philadelphia, Pennsylvania. The Officer asked for plaintiff's documents and the plaintiff handed him his passport and military service record. The Officer kept the passport and returned the military service record.

The three men then proceeded to Philadelphia where the plaintiff executed a sworn statement setting forth the facts.

At Philadelphia, a Warrant of Arrest was issued by Henry L. Mulle, Acting District Director of the Immigration Service, whereby the plaintiff was arrested for a violation of the Immigration Act of May 26, 1924, in that he had remained in the United States after failure to maintain the exempt status under which he had been admitted as a visitor for business.

A Warrant Hearing was conducted on January 25, 1952, at Philadelphia before Special Inquiry Officer, Willard S. Layton, at which time the plaintiff was represented by counsel. From testimony at said hearing it developed that the plaintiff entered the United States on September 9, 1951, at New York via airplane from Portugal and came purely for business purposes; he was admitted for a period of two months' time within which to carry on that business and he never applied or received an extension of his temporary stay. He accepted gainful employment in the United States one day after arrival and was still employed at the time of his arrest.

As a result of the hearing the plaintiff was ordered to be deported under the charge stated in the Warrant of Arrest and plaintiff's counsel subsequently took all necessary administrative appellate procedures.

1. Plaintiff contends that the procedures under the Administrative Procedure Act, 5 U. S. Section 1001 et seq., apply to hearings of the type involved here. However, in the case of *Marcello v. Bonds*, 349 U. S. 302, the Supreme Court held that a deportation hearing conducted under the Immigration and Naturalization Acts need not comply

with the requirements of the Administrative Procedure Act. This holding has recently been reaffirmed in the Third Circuit in the case of *Costas Tsimouris v. S. W. Holland*, District Director, Immigration and Naturalization Service, 228 F. 2d 907, and therefore plaintiff's position is manifestly not well taken.

2-4. Plaintiff next contends that without a warrant plaintiff's arrest and search and seizure was illegal. Under 8. U. S. C. Section 1357(a) (1) (2), an Immigration Officer is authorized without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest". Thus, there is statutory authority for the original interrogation on December 13, 1951 and for the subsequent arrest since it developed that there was a possibility the plaintiff had overstayed his legal time in the United States which had expired on October 5, 1951.

As to the contention that the grant of authority contained in Section 1357 is unconstitutional, it is observed that it was rejected by the U. S. Court of Appeals for the Third Circuit as "being wholly lacking in merit" in the case of *United States v. Correia*, 207 F. 2d 595. See also *Taylor v. Fine et al.*, 115 Fed. Supp. 68.

With respect to the search and seizure of documents here it is clear from plaintiff's own testimony that the same were not illegal and that all documents kept by the Officer were voluntarily given to him by the plaintiff.

5-6. Finally, plaintiff contends that the Arresting Officer did not testify as to the facts of the arrest or as to the facts relative to the execution of plaintiff's affidavit. The factual situation concerning the arrest was testified to by the plaintiff himself and was sufficient to support the

he was leaving for Philadelphia, Pennsylvania. The Officer asked for plaintiff's documents and the plaintiff handed him his passport and military service record. The Officer kept the passport and returned the military service record.

The three men then proceeded to Philadelphia where the plaintiff executed a sworn statement setting forth the facts.

At Philadelphia, a Warrant of Arrest was issued by Henry L. Mulle, Acting District Director of the Immigration Service, whereby the plaintiff was arrested for a violation of the Immigration Act of May 26, 1924, in that he had remained in the United States after failure to maintain the exempt status under which he had been admitted as a visitor for business.

A Warrant Hearing was conducted on January 25, 1952, at Philadelphia before Special Inquiry Officer, Willard S. Layton, at which time the plaintiff was represented by counsel. From testimony at said hearing it developed that the plaintiff entered the United States on September 9, 1951, at New York via airplane from Portugal and came purely for business purposes; he was admitted for a period of two months' time within which to carry on that business and he never applied or received an extension of his temporary stay. He accepted gainful employment in the United States one day after arrival and was still employed at the time of his arrest.

As a result of the hearing the plaintiff was ordered to be deported under the charge stated in the Warrant of Arrest and plaintiff's counsel subsequently took all necessary administrative appellate procedures.

1. Plaintiff contends that the procedures under the Administrative Procedure Act, 5 U. S. Section 1001 et seq., apply to hearings of the type involved here. However, in the case of *Marcello v. Bonds*, 349 U. S. 302, the Supreme Court held that a deportation hearing conducted under the Immigration and Naturalization Acts need not comply

with the requirements of the Administrative Procedure Act. This holding has recently been reaffirmed in the Third Circuit in the case of *Costas Tsimouris v. S. W. Holland*, District Director, Immigration and Naturalization Service, 228 F. 2d 907, and therefore plaintiff's position is manifestly not well taken.

2-4. Plaintiff next contends that without a warrant plaintiff's arrest and search and seizure was illegal. Under 8. U. S. C. Section 1357(a) (1) (2), an Immigration Officer is authorized without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest". Thus, there is statutory authority for the original interrogation on December 13, 1951 and for the subsequent arrest since it developed that there was a possibility the plaintiff had overstayed his legal time in the United States which had expired on October 5, 1951.

As to the contention that the grant of authority contained in Section 1357 is unconstitutional, it is observed that it was rejected by the U. S. Court of Appeals for the Third Circuit as "being wholly lacking in merit" in the case of *United States v. Correia*, 207 F. 2d 595. See also *Taylor v. Fine et al.*, 115 Fed. Supp. 68.

With respect to the search and seizure of documents here it is clear from plaintiff's own testimony that the same were not illegal and that all documents kept by the Officer were voluntarily given to him by the plaintiff.

5-6. Finally, plaintiff contends that the Arresting Officer did not testify as to the facts of the arrest or as to the facts relative to the execution of plaintiff's affidavit. The factual situation concerning the arrest was testified to by the plaintiff himself and was sufficient to support the

he was leaving for Philadelphia, Pennsylvania. The Officer asked for plaintiff's documents and the plaintiff handed him his passport and military service record. The Officer kept the passport and returned the military service record.

The three men then proceeded to Philadelphia where the plaintiff executed a sworn statement setting forth the facts.

At Philadelphia, a Warrant of Arrest was issued by Henry L. Mulle, Acting District Director of the Immigration Service, whereby the plaintiff was arrested for a violation of the Immigration Act of May 26, 1924, in that he had remained in the United States after failure to maintain the exempt status under which he had been admitted as a visitor for business.

A Warrant Hearing was conducted on January 25, 1952, at Philadelphia before Special Inquiry Officer, Willard S. Layton, at which time the plaintiff was represented by counsel. From testimony at said hearing it developed that the plaintiff entered the United States on September 9, 1951, at New York via airplane from Portugal and came purely for business purposes; he was admitted for a period of two months' time within which to carry on that business and he never applied or received an extension of his temporary stay. He accepted gainful employment in the United States one day after arrival and was still employed at the time of his arrest.

As a result of the hearing the plaintiff was ordered to be deported under the charge stated in the Warrant of Arrest and plaintiff's counsel subsequently took all necessary administrative appellate procedures.

1. Plaintiff contends that the procedures under the Administrative Procedure Act, 5 U. S. Section 1001 et seq., apply to hearings of the type involved here. However, in the case of *Marcello v. Bonds*, 349 U. S. 302, the Supreme Court held that a deportation hearing conducted under the Immigration and Naturalization Acts need not comply

with the requirements of the Administrative Procedure Act. This holding has recently been reaffirmed in the Third Circuit in the case of *Costas Tsimouris v. S. W. Holland*, District Director, Immigration and Naturalization Service, 228 F. 2d 907, and therefore plaintiff's position is manifestly not well taken.

2-4. Plaintiff next contends that without a warrant plaintiff's arrest and search and seizure was illegal. Under 8. U. S. C. Section 1357(a) (1) (2), an Immigration Officer is authorized without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest". Thus, there is statutory authority for the original interrogation on December 13, 1951 and for the subsequent arrest since it developed that there was a possibility the plaintiff had overstayed his legal time in the United States which had expired on October 5, 1951.

As to the contention that the grant of authority contained in Section 1357 is unconstitutional, it is observed that it was rejected by the U. S. Court of Appeals for the Third Circuit as "being wholly lacking in merit" in the case of *United States v. Correia*, 207 F. 2d 595. See also *Taylor v. Fine et al.*, 115 Fed. Supp. 68.

With respect to the search and seizure of documents here it is clear from plaintiff's own testimony that the same were not illegal and that all documents kept by the Officer were voluntarily given to him by the plaintiff.

5-6. Finally, plaintiff contends that the Arresting Officer did not testify as to the facts of the arrest or as to the facts relative to the execution of plaintiff's affidavit. The factual situation concerning the arrest was testified to by the plaintiff himself and was sufficient to support the

finding of the Hearing Officer. The plaintiff was not prejudiced by the failure of the Arresting Officer to corroborate his testimony in that respect.

The introduction of the sworn statement of the plaintiff was not error since, prior to its admission as evidence, the plaintiff himself identified it as a document which he had executed and which was correct.

7. In conclusion, no genuine issues of fact existing and all issues of law having been resolved in favor of the defendant, the motion of the defendant for summary judgment will accordingly be granted.

An order pursuant to the foregoing opinion will be prepared and submitted.

No. 13550

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANUEL JOAO COELHO, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED
STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
EDWARD O. FENNELL,
JOHN W. KERN III,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED

DEC 21 1956

Joseph W. Stewart

CLERK

QUESTIONS PRESENTED

This appeal is taken from an order entered by the District Court denying appellant's motion for a preliminary injunction to restrain appellee from deporting appellant who had been found administratively to be deportable for the reason that he was an alien admitted temporarily into the United States as a visitor on business who remained here beyond the time authorized for his stay. In the opinion of the appellee, the following questions are presented:

1. Whether the Special Inquiry Officer was justified in refusing to answer questions from appellant's counsel concerning whether the Special Inquiry Officer was under the supervision and control of the District Director of the particular immigration district in which the deportation hearing was held?

2. Whether the Special Inquiry Officer's decision—that appellant was deportable for the reason that he was an alien admitted as a business visitor who remained in the United States beyond the period for which he had been admitted—was based upon reasonable, probative and substantial evidence?

INDEX

Counterstatement	Page 1
Statutes and Regulations	8
Summary of Argument	12
Argument:	
I. The Special Inquiry Officer's Refusal to Reveal the Identity of His Supervisor Was Not Error and His appointment by the Commissioner Is Authorized by Statute	13
II. Appellant's Arrest by Immigration Officers Was Not Illegal and the Decision by the Special Inquiry Officer Was Based Upon Reasonable, Probative and Substantial Evidence	17
Conclusion	22

TABLE OF CASES

<i>Bilokumsky v. Tod</i> , 263 U. S. 149 (1923)	21
<i>Coz v. Democratic Central Committee of the District of Columbia</i> , 91 U. S. App. D. C. 416, 200 Fed. 356 (1952)	13
<i>Deckert v. Independence Corp.</i> , 311 U. S. 282 (1940)	13, 14
<i>Diogo v. Zimmerman</i> , C. A. No. 16680 (E. D. Pa. 1956)	18, 20
<i>Embassy Dairy v. Camalier</i> , 93 U. S. App. D. C. 364, 211 F. 2d 41 (1954)	13
<i>Johnson v. Stevenson</i> , 170 F. 2d 108 (5th Cir. 1948)	14
<i>Marcello v. Bonds</i> , 349 U. S. 302 (1955)	15, 16
<i>Meccano, Ltd. v. John Wanamaker</i> , 253 U. S. 136 (1920)	14
<i>Navarette-Navarette v. Landon</i> , 223 F. 2d 234 (9th Cir. 1955)	21
<i>Smith v. Vulcan Iron Works</i> , 165 U. S. 518 (1897)	13
<i>Tsimounis v. Holland</i> , 132 F. Supp. 754 (E. D. Pa. 1955), <i>aff'd</i> 228 F. 2d 907 (3rd Cir. 1956)	19
<i>United States v. Correia</i> , 207 F. 2d 595 (3rd Cir. 1953)	18

OTHER REFERENCES

Administrative Procedure Act, § 5 (c), 60 Stat. 239, 5 U. S. C. § 1004 (c) (1952)	15
8 C. F. R. § 9.1 (b) (1952)	17
F. R. Civ. P. 10 (c)	14
Immigration and Nationality Act of 1952, § 291, 66 Stat. 234, 8 U. S. C. § 1361 (1952)	17

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13550

MANUEL JOAO COELHO, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED
STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Judicial Proceedings.

On August 16, 1956, appellant filed in the United States District Court for the District of Columbia a complaint for declaratory judgment and injunctive relief, naming the Attorney General as defendant (App. 27, 32¹). Generally, appellant alleged in this complaint that (1) he had been unlawfully arrested by immigration officers and certain documents had been taken from him without benefit of a search warrant (2) the Special Inquiry Officer before whom the deportation hearing had been held lacked authority to conduct such hearing and (3) the Special Inquiry Officer committed certain errors in the admission of evidence and the conduct of the deportation hearing, which hearing resulted in a finding

¹References in this brief to Appellant's Appendix shall be denoted by the use of App. Since the record on appeal is composed of the entire original record and it has no continuous pagination, references in this brief to papers in the record shall be denoted only by the use of the title and file date of the particular paper.

that appellant was deportable (App. 27-31). Simultaneously with the filing of this complaint, appellant filed a motion for preliminary injunction "against defendant [the Attorney General], restraining the defendant from apprehending and deporting plaintiff [appellant] pending determination of this suit, upon the grounds and in accordance with the averments set forth in the complaint." (App. 33). The Attorney General, the defendant and appellee on this appeal, filed on August 24, 1956, an opposition to appellant's motion for preliminary injunction in which opposition appellee stated: "Attached hereto and made a part hereof is the file of the Immigration and Naturalization Service (File No. A8839362²) relating to plaintiff [appellant] herein."

On August 17, 1956, the District Court, after a hearing, entered an order restraining appellee and his agents from deporting appellant from the United States "pending the disposition of the motion for preliminary injunction * * *". On August 27, 1956, the District Court upon consideration of the complaint, the preliminary injunction motion with attached affidavit, the opposition thereto, the immigration file relating to appellant, and argument by counsel concluded that appellant was deportable as an alien visitor on business who had remained in the United States for a longer period of time than authorized (App. 34-35). The District Court denied appellant's motion for preliminary injunction by an order dated August 27, 1956 and filed August 30, 1956. Appellant filed a timely notice of appeal "from the order of this court [the District Court] entered on the 30th day of August, 1956 in favor of defendant [appellee] against plaintiff [appellant]."

B. Administrative Proceedings.

Immigration file A8839363 relating to Manuel Joao Coelho discloses essentially the following facts. Appellant was charged with being an alien who at the time of his entry into the United States on July 15, 1955 was not in possession of a valid visa and

² Immigration file A8839362 relating to Manuel Joao Coelho bears a stamp showing it was filed in the District Court on August 24, 1956, and it is a part of the record on appeal.

was therefore deportable under the Immigration and Nationality Act of 1952 (Immig., Hearing, p. 2).³ On March 16, 1956, a deportation hearing was held before a Special Inquiry Officer at which hearing appellee, his counsel and an interpreter were present (Immig., Hearing p. 1). Appellant's counsel addressed certain inquiries to the Special Inquiry Officer concerning his appointment and the identity of his supervisor (Immig., Hearing p. 2, 3, 4). The Special Inquiry Officer stated (Immig., Hearing p. 3):

"I shall make only one statement * * * I have been appointed a Special Inquiry Officer by the Commissioner of the Immigration and Naturalization Service pursuant to the Immigration and Nationality Act. I will answer no further questions and make no further statements with respect to my authority or right to conduct the proceedings.

COUNSEL. That is why I respectfully object to the conduct of these proceedings by you on the ground that there is no specific authority in the Immigration and Nationality Act for the appointment of Special Inquiry Officers. I also object to the conduct of these proceedings by you on the ground that you have not been appointed to act as a hearing examiner under the Administrative Procedure Act."

The objection by appellant's counsel was overruled.

The warrant issued by the Immigration and Naturalization Service for the arrest of appellant for being in the United States in violation of law was received in evidence as Exhibit 1, although appellant objected on the ground that the officer who had served the warrant should have been present. (Immig., Hearing, p. 2). The warrant of arrest showed upon its face that it had been issued on November 2, 1955, and that it had been served upon appellant in Buffalo, New York on November 2, 1955, and at that time appellant had been informed through an interpreter of the cause for his arrest (Immig., Ex. 2). A

³ References in this brief to Immigration file A8839362 shall be denoted by the use of Immig. It has no continuous pagination.

"Form 257", a documentary record of an alien's entry into the United States, was introduced to show that appellant had been admitted at New York on July 15, 1955, as a non-immigrant for business purposes, for a period of 15 days and that appellant's authorized stay had been extended until October 2, 1955. This "Form 257" was received in evidence and marked Exhibit 2, although appellant's counsel objected on the ground that it had been taken from appellant without a warrant. (Immig., Hearing p. 6, Ex. 2).

The Special Inquiry Officer showed appellant a sworn statement appearing on its face to have been made by appellant on November 1, 1955, to Immigration officers and asked appellant if he had signed such document. Appellant's counsel objected on the ground that it was improper for the Government to require appellant to identify the statement (Immig., Hearing p. 6). The objection was overruled, and appellant acknowledged that he had made this statement to an immigrant inspector but that he had not been able to understand the immigrant inspector who had spoken to him in Spanish. The Special Inquiry Officer asked appellant to review this statement with the assistance of the Portuguese interpreter present and point out any incorrect answers therein (Immig., Hearing p. 7). Appellant referred to item 10 of the statement and testified he did not remember having stated there that he intended to stay in the United States as long as he possibly could. He referred to item 15 of the statement and testified he did not know the requirements of the Alien Registration Act of 1940, although he had stated there that he did know. The sworn statement made by appellant on November 1, 1955, was received in evidence and marked as Exhibit 3 subject to the explanations of appellant. (Immig., Hearing p. 8). Exhibit 3 shows upon its face that it is a record of a sworn statement made in Spanish by appellant to Immigrant Inspector Bundy concerning appellant's status in the United States. Appellant stated therein that it was made voluntarily. Appellant also stated therein that he was a native and citizen of Portugal who came into the United States on July 15, 1955, on a visitor's visa.

The Special Inquiry Officer lodged a new charge against appellant that he was subject to deportation pursuant to Section 241(a)(2) of the Immigration and Nationality Act of 1952 in that after being admitted to the United States as a business visitor under Section 101(a)(15)(B) of the 1952 Act he had remained in the United States for a longer period than authorized. Appellant stated that he understood this charge lodged against him and appellant's attorney stated that he would not need an adjournment or any additional time for the purpose of meeting the new charge. (Immig., Hearing p. 8).

The Special Inquiry Officer received in evidence and marked as Exhibit 4 a letter appellant admitted having written to the Immigration and Naturalization authorities at Buffalo, in which he acknowledged receipt of a notice to appear before an Examiner on December 8, 1955, and he requested permission to depart voluntarily from the United States rather than appear at the hearing. The Special Inquiry Officer received in evidence and marked as Exhibit 5 a "Form I-539" application for extension of time of temporary stay, which application appellant acknowledged having executed on July 26, 1955. Appellant objected to the admission into evidence of these exhibits on the ground that he was being examined before the Government presented any witnesses. Such objections were overruled. (Immig., Hearing pp. 9-10).

Before appellant's counsel examined appellant, the following colloquy took place between appellant's counsel and the Special Inquiry Officer (Immig., Hearing pp. 11-12):

"THE SPECIAL INQUIRY OFFICER. Well, it is my ruling that all questions relating to the illegality of arrest, in and of itself, is immaterial and will be excluded. However, I shall permit questions which are designed especially to establish that any of the actions of the respondent [appellant] in his dealings with immigration officers were involuntary. Do you understand the nature of my ruling?

THE ATTORNEY. Yes, sir. I presume, sir, that your ruling would cover any question of voluntary action on his part from the moment when he was taken into cus-

tody and arrested up until—covering the exclusion of those documents.

THE SPECIAL INQUIRY OFFICER. I wish to point out that the mere fact, if established that his arrest was illegal, that fact is irrelevant to these proceedings, but you may question the respondent [appellant] regardless of the illegality of the arrest, to establish that any actions on his part if dealing with service officers, were involuntary."

Appellant testified that he had been "first arrested" by Immigration officers in Silver Creek, New York (Immig., Hearing p. 11). He did not state the date. There were two officers, one of whom was an immigration officer and who asked appellant in Spanish for his papers. When appellant stated that he did not have his papers with him, the officer said: "Let us go to your house." Appellant testified that he would not have gone to his house had they not been officers and had they not ordered him to go. (Immig., Hearing p. 12-13). At his house, appellant took from his suitcase certain papers and gave them to the officers. These papers were Portuguese documents which included his passport, his identity card, his military identity card and a certificate of the criminal register. At the deportation hearing, appellant was shown Ex. 2 (the "Form 257" which showed his date of entry into the United States) and was asked if he had given that document to the officers. Appellant testified: "I cannot remember. I am not sure, but I believe that that paper was together with my passport" (Immig., Hearing p. 13).

Appellant testified that one of the officers wore a uniform and carried a pistol. Appellant testified that he did not give up the papers voluntarily and that he was afraid. (Immig., Hearing p. 13-14). Appellant testified that no Immigration Officer threatened him with any offer of violence or laid hands upon him (Immig., Hearing p. 20). The officers did not show appellant a warrant for his arrest or a search warrant. Appellant testified that after the officers had taken the documents, he was taken to Buffalo. (Immig., Hearing p. 14). Appellant returned to his home that night and went back to the office in Buffalo the next day (Immig., Hearing p. 14). The warrant for appellant's ar-

rest showed upon its face that it was served on appellant on November 2, 1955, at Buffalo, New York (Immig. Ex. 1).

The Special Inquiry Officer asked appellant whether he had arrived in the United States at the port of New York on July 15, 1955, with a visitor's visa (Immig., Hearing p. 17). Appellant's counsel objected to the question on the grounds that (1) it was not a proper question for cross-examination and (2) it was a question relating to documents illegally seized by the immigration officers in violation of the fourth and fifth amendments. Appellant's objection was overruled and appellant stated an affirmative answer to the Special Inquiry Officer's question. (Immig., Hearing p. 17). Appellant stated, in answer to questions by the Special Inquiry Officer, that his application for an extension of his temporary stay had been granted until October 2, 1955, and that he had not received any further extension of his stay beyond October 2, 1955 (Immig., Hearing pp. 19-20).

On March 16, 1956, the Special Inquiry Officer made findings of fact and conclusions of law that appellant was not subject to deportation upon the charge contained in the warrant of arrest but was deportable upon the charge lodged at the deportation hearing, in that appellant had been admitted as a business visitor and had remained beyond the time authorized. The privilege of voluntary departure was granted appellant. (Immig., Decision of Special Inquiry Officer, March 16, 1956, p. 2).

Appellant noted an appeal with the Board of Immigration Appeals which rendered its decision on May 25, 1956. The Board noted appellant's contention that his "Form 257" showing the date of his arrival in the United States had been obtained by illegal search and seizure. The Board pointed out that this document had been voluntarily handed over by appellant to Immigration Officers and that appellant admitted that he had not been threatened with violence. The Board also noted that it was not clear from the administrative record that appellant had given this document to the officers since appellant had been certain only that he had given over all of his Portuguese documents. The Board also ruled that the

officers had the authority under the 1952 Act to question appellant as to his right to be or remain in the United States. The Board noted appellant's objection to admission into evidence of Exhibit 3—his sworn statement. The Board pointed out that the two items in his statement, to which appellant had objected specifically, were irrelevant to the deportation charge. The Board also pointed out that appellant's deportability was established by his own testimony without reference to the Exhibits to which he had objected. The Board concluded that the deportation hearing had been fair and in compliance with the statute and regulations and that appellant's deportability was established by the testimony adduced at the hearing. The Board dismissed appellant's appeal and gave appellant until August 18, 1956, to make his voluntary departure. (Immig., Decision of the Board of Immigration Appeals, May 25, 1956). On August 16, 1956, appellant filed his complaint in the District Court (App. 27).

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portions of the Immigration and Nationality Act of 1952, ch. 477, title II, ch. 5, 66 Stat. 163 et seq., 8 U.S.C. § 1101 et seq. (1952) are as follows:

“§ 101 (a) (15) (b). The term immigrant means every alien except an alien who is within one of the following classes of non-immigrant aliens—an alien * * * having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure * * *

§ 241 (a) (2). Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who * * * is in the United States in violation of this Act or in violation of any other law of the United States * * *

§ 242 (b). A Special Inquiry Officer shall conduct proceedings under this section to determine the deport-

ability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witness * * * Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present. * * * Proceedings before a special inquiry officer * * * shall be in accordance with such regulations * * * as the Attorney General shall prescribe. Such regulations shall include requirements that—(1) the alien shall be given notice * * * of the nature of the charges against him * * * (2) the alien shall have the privilege of being represented * * * by * * * counsel * * * (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.

§ 287 (a) (1). Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant * * * to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *

§ 291. * * * In any deportation proceeding * * * against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States * * * If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law."

2. The pertinent portions of 8 C. F. R. § 242 (1952) are as follows:

"§ 242.11 *Investigations*—(a) *Persons Believed to be Subject to Deportation*. The case of every person be-

lieved to be subject to arrest and deportation shall be investigated by such officer as may be necessary for that purpose.

(b) *Purpose of Investigation.* The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably established that the person investigated is an alien and that he is subject to deportation.

(c) *Recorded Statements.* Whenever, in the course of an investigation, information is obtained which indicates that the person investigated is subject to arrest and deportation, and it is desired to use such information as evidence in support of an application for a warrant of arrest, such information shall be reduced to writing either in narrative or question-and-answer form and signed by the person furnishing the information. Whenever such recorded statement is to be obtained from any person, the investigating officer shall (1) identify himself to such person, (2) warn the person that any statement made by him may be used as evidence against him in any subsequent proceeding, and (3) place the person under oath or affirmation.

* * * * *

§ 242.13 *Issuance of Warrants of Arrests.* Any officer * * * who receives an application for a warrant of arrest may issue such warrant in any case in which he determines that a prima facie case for deportation has been established.

§ 242.14 *Execution of Warrants of Arrests—(a) Service.* Except as provided in § 242.34, an alien against whom a warrant of arrest has been issued shall be taken into custody under the authority of the warrant of arrest, or if previously taken into custody without a warrant of arrest under the authority contained in § 287 of the Immigration and Nationality Act, shall be continued in custody under the warrant of arrest subsequently issued unless his release is authorized. In either case a copy of the warrant of arrest shall be served upon

the alien, and he shall then be fully advised of the cause of his arrest * * *

* * * * *

§ 242.41 *Voluntary Departure Prior to Commencement of Hearing; Procedure.* Any alien, other than an alien prima facie deportable under § 242 (f) of the Immigration and Nationality Act, who believes himself to be eligible for voluntary departure under § 242 (b) of the said Act may apply therefor at an office of the Service at any time prior to the commencement of the hearing under a warrant of arrest in his case. The District Director or officer in charge having administrative jurisdiction over the office receiving an application for voluntary departure may cause such investigation to be conducted as he deems necessary to determine whether the relief in question should be granted. * * *

* * * * *

§ 242.53 *Conduct of Hearing—(a) Special Inquiry Officer; General Powers.* The special inquiry officer assigned to conduct the hearing under this part shall have the authority to: (1) administer oaths and affirmations; * * * (3) conduct the hearing, present and receive evidence, and rule upon all objections to the introduction of evidence or motions made during the course of the hearing; * * *

(b) *Special Inquiry Officers; General Duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial, and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious.

* * * * *

(d) *Special Inquiry Officers, Additional Charges.* If it appears during the hearing that the respondent may be deportable on charges other than or in addition to those contained in the warrant of arrest or in the notice of hearing, the special inquiry officer * * * may lodge additional charges against the respondent and shall de-

velop evidence upon such charges in like manner as on the charges contained in the warrant of arrest or notice of hearing. When additional charges are lodged, the special inquiry officer shall explain these charges to the respondent in simple, understandable language and shall advise him, if he is not represented by an attorney or other qualified representative, that he may be so represented if he desires, and require him to state then and there for the record whether he desires such representation. The special inquiry officer shall also inform the respondent that he may have a reasonable period of time within which to meet the additional charges, if he desires, and require him to state then and there whether he desires such additional time. * * *

* * * * *

§ 242.54 (b) *Use of Prior Statements.* The special inquiry officer may enter of record any statement, oral or written, which is material and relevant to any issue in the case, previously made by the respondent or any other person during any examination, investigation, or hearing. If objection thereto is made by the alien or his counsel or representative, the reasons for the objection, as well as the ruling thereon by the special inquiry officer shall be made a part of the record."

SUMMARY OF ARGUMENT

1. This Court can wholly dispose of the instant case on the merits although this is an appeal from the denial of appellant's motion for preliminary injunction. The Special Inquiry Officer was justified in refusing to answer questions about the identity of his supervisor in view of the decision in *Marcello v. Bonds*, 349 U. S. 302 (1955). The appointment of the Special Inquiry Officer by the Commissioner of Immigration and Naturalization was authorized by section 103 of the Immigration and Nationality Act of 1952.

2. The transcript of proceedings at the deportation hearing reveals that appellant testified fully as to the events leading to his arrest by immigration officers and their testimony would have been merely cumulative. Appellant expressly identified

the warrant for his arrest received in evidence at the deportation proceeding as being the warrant served upon him. The immigration officers had statutory authority to take appellant into temporary custody for the purpose of questioning him as to his right to be or remain in the United States and his subsequent arrest was concededly effected under a warrant. Appellant's record of date of entry, if it left the possession of appellant at all and came into possession of the immigration officers, was given voluntarily since no physical coercion or threats were directed against him.

Appellant's sworn statement to the immigrant inspector as a result of the questioning as to his right to be in the United States was properly considered by the Special Inquiry Officer because appellant's objections were to portions of the statement that were entirely irrelevant to the deportation charge. Either appellant's own testimony at the deportation hearing or other exhibits admitted in evidence were sufficient to establish his deportable status and consequently the Special Inquiry Officer's decision was based upon reasonable, substantial and probative evidence.

ARGUMENT

I

The Special Inquiry Officer's Refusal To Reveal the Identity of His Supervisor Was Not Error and His Appointment by the Commissioner Is Authorized by Statute.

This appeal is taken from a denial by the District Court of appellant's motion for preliminary injunction restraining appellee from deporting appellant. Appeals may be taken from certain interlocutory orders, including the denial of a preliminary injunction, pursuant to 28 U. S. C. § 1292 (2) (1952). A motion for preliminary injunction seeks to maintain the status quo pending the hearing and determination of a case on the merits.⁴ The granting or denying of such motion is dependent upon the sufficiency of the showing of imminent irreparable

⁴ It may be noted that the status quo in the instant case has already been fixed and will be maintained pending disposition of appeal by virtue of this Court's order on October 17, 1956 staying appellant's deportation pending hearing and decision in this appeal.

injury to the movant, the probability of the ultimate success or failure of the suit, and the balancing of the right asserted against the act sought to be enjoined. *Embassy Dairy v. Camaller*, 93 U. S. App. D. C. 364, 367, 211 F. 2d 41 (1954). The grant or denial of such motion by a district court may be upset on appeal only if there has been a clear abuse of discretion. *Cox v. Democratic Central Committee of the District of Columbia*, 91 U. S. App. D. C. 416, 200 F. 2d 356 (1952). However, appellate courts may on interlocutory appeals consider and decide cases on the merits and thus terminate litigation where it is clear from the complaint that the movant cannot succeed on his cause of action. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 525 (1897); *Deckert v. Independence Corp.*, 311 U. S. 282, 287 (1940); *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136, 141 (1920); *Johnson v. Stevenson*, 170 F. 2d 108, 111 (5th Cir. 1948). It is submitted that the allegations of the complaint, when read with the transcript of the deportation hearing contained in the Immigration file relating to appellant, show clearly that appellant is not entitled to the relief he seeks, and, therefore, this Court can dispose of the instant case by a decision on the merits and a subsequent order of dismissal.

At the outset, appellant contends that the Immigration file relating to appellant was not before the District Court and therefore its consideration by that court in denying appellant's motion for preliminary injunction was error. This contention is wholly refuted by the record and is totally without merit. Appellant filed in the District Court his complaint for declaratory judgment and injunctive relief and, on the same date, filed his motion for preliminary injunction "upon the grounds and in accordance with the averments set forth in the complaint". On August 24, 1956, the record reveals, appellee filed his opposition to appellant's preliminary injunction motion and stated in such opposition: "*Attached hereto and made a part hereof is the file of the Immigration and Naturalization Service (File No. A-8839362) relating to plaintiff [appellant] herein.*" [Emphasis supplied.] Thus, the Immigration file relating to appellant was a part of appellee's opposition below and was therefore a part of the pleadings. See F. R. Civ. P. 10 (c). The Immigration file relating to appellant, which

bears the file stamp of the District Court, was an exhibit properly before the court and was properly considered by it in denying appellant's motion for preliminary injunction.

Prior to discussing appellant's other contentions concerning alleged procedural defects in the deportation hearing, the substantive grounds for appellant's deportability should be stated. The Special Inquiry Officer, after the deportation hearing, found that appellant is a native and citizen of Portugal who in July, 1955 was admitted into the United States as an alien visitor on business for a limited period of time and who obtained an extension of his stay until October, 1955 but remained in the United States beyond the expiration of that extension. The Special Inquiry Officer concluded appellant was deportable pursuant to section 241 (a) (2) of the Immigration and Nationality Act of 1952—which provides for the deportation of any alien who is in the United States in violation of law—in that appellant remained in this country beyond the time for which he had been admitted. Since appellant admitted at the deportation hearing all the above facts necessary to constitute him deportable under the Act of 1952, appellant has at no time challenged, nor could he challenge, the Special Inquiry Officer's conclusion. Appellant contents himself rather with procedural sniping at the administrative proceedings.

Appellant urges that the Special Inquiry Officer erred at the deportation hearing by refusing to answer appellant's questions inquiring as to the extent of control exercised over the Special Inquiry Officer by the District Director (Br. Argument II). Appellant is foreclosed from successfully raising this issue by the decision of the Supreme Court in *Marcello v. Bonds*, 349 U. S. 302 (1955). In *Marcello*, an alien, convicted in 1938 of violating the Marihuana Tax Act, had been ordered deported. The validity of the deportation order was challenged in a habeas corpus proceeding in which the alien alleged, *inter alia*, that the deportation hearing held under Section 242 (b) of the Immigration and Nationality Act of 1952 failed to comply with the requirements of the Administrative Procedure Act in that the special inquiry officer was under the supervision and control of officials in the Immigration Service who performed investigative and prosecuting functions. The alien

also alleged that Section 242 (b) violated the fifth amendment because it failed to provide for a fair and impartial hearing. The alien argued to the Supreme Court that where the Immigration and Nationality Act of 1952 differed from the Administrative Procedure Act the provisions of the latter should govern, and the alien pointed to Section 5 (c)—the “separation of functions” provision—of the Administrative Procedure Act as differing significantly from the procedures set forth by Section 242 (b). The alien showed that Section 5 (c) provided that hearing officers shall not be responsible to or under the supervision of those engaged in investigation and prosecution, whereas the special inquiry officers, charged under Section 242 (b) with conducting deportation hearings, were subject to the supervision of not only district directors of the immigration districts but also of higher service officials. All such officials had investigative and enforcement responsibilities. Thus, the alien’s argument in the Supreme Court was directed against the supervision of the special inquiry officer by investigative and prosecuting officials of the Service. *Marcello v. Bonds, supra*, at 305–306. However, the Supreme Court said (at p. 306): “For the sake of clarity, we shall consider all of the differences in the hearing provisions of the two Acts in determining whether the Administrative Procedure Act is to govern.” The Supreme Court concluded that the Act of 1952 expressly superseded the hearing provisions of the Administrative Procedure Act and that the fact that a special inquiry officer is subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions does not so strip a deportation hearing of fairness and impartiality as to make the hearing procedures set forth by Section 242 (b) violative of the fifth amendment.

Thus, it may be seen in the instant case that the information sought at the deportation hearing by appellant from the Special Inquiry Officer as to the extent of control exercised over him by the District Director was absolutely irrelevant in view of the Supreme Court’s decision in *Marcello* upholding the administrative decision that an alien was deportable, although such decision of deportability was rendered by a Special Inquiry Officer clearly shown to have been under the supervision of a

district director and of even higher Service officials. In the instant case, appellant can scarcely contend with success that he was denied a fair hearing and due process by the Special Inquiry Officer forbidding inquiry into the extent of control over him exercised by the District Director when the Supreme Court has decided in *Marcello* that the control of a Special Inquiry Officer by Service officials having investigative and enforcement functions does not so strip a deportation hearing of fairness and impartiality as to violate due process.

Appellant also questions the authority of the Special Inquiry Officer to have conducted the deportation hearing in view of the fact that he had been appointed to his position by the Commissioner of Immigration and Naturalization. (Br. Argument V). The Attorney General is authorized by Section 103 (a) of the Immigration and Nationality Act of 1952 to "appoint such employees of the Service as he deems necessary". The Commissioner of Immigration and Naturalization pursuant to Section 103 (b) of that Act is "charged with any and all responsibilities and authority in the administration of the Service and of this Act which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General." 8 C. F. R. § 9.1 (b) provides: "*The Commissioner may designate, select, and appoint as a special inquiry officer any immigration officer whom he deems specifically qualified * * **". Consequently, it is clear that the Special Inquiry Officer's appointment by the Commissioner was valid and that the Special Inquiry Officer had specific authority under Section 242 (b) of the Act of 1952 to conduct the deportation hearing.

II

Appellant's Arrest by Immigration Officers Was Not Illegal and the Decision by the Special Inquiry Officer Was Based Upon Reasonable, Probative and Substantial Evidence

Appellant contends that the Special Inquiry Officer erroneously refused to permit him to testify as to his alleged illegal arrest by the immigration officers, erroneously failed to call the arresting immigration officers, to testify concerning this

alleged illegal arrest, and erroneously admitted into evidence at the deportation hearing the warrant for appellant's arrest without identification. (Br. Argument II). An examination of the proceedings at the deportation hearing, contained in the Immigration file, reveals that appellant was examined about and testified to his arrest in some detail (Immig., Hearing pp. 11-14). His testimony commenced with a description of his initial contact with the immigration officers, continued through his being taken into custody for questioning and ended with his arrest under a warrant and his subsequent release on bond. His testimony narrated events occurring during a period of two days. It cannot be shown that appellant's testimony concerning the manner of his arrest was cut off or restricted by the Special Inquiry Officer in any way. In view of appellant's testimony at the deportation hearing as to the events surrounding his arrest, any testimony by the immigration officer would merely have been cumulative and not necessary to support the Special Inquiry Officer's decision. *Diogo v. Zimmerman*, C. A. No. 16680 (E. D. Pa. 1956) (App. 39). Furthermore, it is difficult to understand in what way appellant was prejudiced by the failure of the immigration officers to corroborate appellant's own testimony. Appellant complains that the warrant issued for his arrest, and served upon him on November 2, 1955, was received in evidence yet never identified at the deportation hearing. Testimony at the deportation hearing was to the contrary. Appellant acknowledged that a copy of the warrant of arrest was delivered to him on or about November 2, 1955 (Immig., Hearing p. 1), and this fact of service is corroborated by the file and date stamp on the warrant itself (Immig., Hearing p. 2, Ex. 1).

Appellant next contends that he was arrested by the immigration officers without a warrant under circumstances in which the Immigration and Nationality Act of 1952 does not permit an arrest without warrant, and appellant complains that documents were taken from him without a search warrant (Br. Argument III). Appellant has misread that Act. Section 287 (a) (1) provides:

"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall

have power without warrant * * * to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *

This section of the Act of 1952 has been held constitutional. *United States v. Correia*, 207 F. 2d 595 (3d Cir. 1953). Consequently, the immigration officers were acting pursuant to law when, without a warrant, they took appellant into temporary custody on November 1, 1955 for the purpose of interrogation as to his suspected alien status in the United States. It is important to note that such custody was temporary only since appellant was released the same day and he returned from the Service offices at Buffalo to his home. The next day, November 2, 1955, appellant was arrested *with a warrant* by the immigration authorities at Buffalo, but released on \$1,000.00 bond after the deportation charge against him had been explained to him (Immig., Ex. 1, Hearing p. 14). It is clear that the immigration officers were following the standard operating procedure provided for by section 287 (a) (1) and the regulations prescribed thereunder. 8 C. F. R. § 242.11 (1952) provides for an investigation to be made by the proper immigration officer of every person believed to be subject to arrest and deportation in order to determine whether there exists credible evidence that the investigated person is a deportable alien. 8 C. F. R. § 242.14 provides:

"* * * [A]n alien against whom a warrant of arrest has been issued shall be taken into custody under the authority of the warrant of arrest, or if previously taken into custody without a warrant of arrest under the authority contained in § 287 of the Immigration and Nationality Act, shall be continued in custody under the warrant of arrest subsequently issued unless his release is authorized." [Emphasis supplied.]

It is clear from the above that appellant was not arrested on November 1, 1955, without warrant, as appellant contends, but rather that he was taken into temporary custody for questioning pursuant to the authority conferred by Section 287 (a) (1). *Tsimounis v. Holland*, 132 F. Supp. 754, 757 (E. D. Pa., 1955), *aff'd.*, 228 F. 2d 907 (3d Cir. 1956). Appellant's subsequent

arrest the next day was made on a warrant and is not challenged here.

Appellant's contention that documents were illegally taken from him by the immigration officers at the time they took him into custody for questioning can scarcely stand in view of the fact that under Section 287 (a) (1) the alleged "arrest" was authorized. But more important is appellant's own testimony at the deportation hearing that he gave the documents to the immigration officers without hesitation or protest. Although appellant testified that he was afraid when he handed over the documents to the immigration officers, he admitted that the officers had at no time threatened him or used any physical coercion. The seizure of the documents was not illegal since they were voluntarily given up by appellant according to his own testimony. See *Diogo v. Zimmerman*, *supra*. Furthermore, the four documents appellant was positive *he had given* to the immigration officers were *Portuguese government* documents which at no time figured in the administrative proceedings herein—either before or at the deportation hearing. Appellant was not at all sure that the document showing the date of his arrival in the United States—his "Form 257" which was received in evidence at the deportation hearing as Exhibit 2—had been among the documents he had given the immigration officers (Immig., Hearing p. 5, 13).

Appellant contends that the decision of the Special Inquiry Officer—that appellant was deportable—was not based upon reasonable, substantial and probative evidence, as required by section 242 (b) (4), but upon the record of arrival (Ex. 2), illegally seized, and the sworn statement (Ex. 3), improperly introduced (Br. Argument IV). As pointed out above, it is not clear that appellant's record of arrival was among those documents given by appellant to the immigration officers on November 1, 1955. Assuming *arguendo* it was one of the documents, it was given voluntarily and not seized. As to the sworn statement, in which statement appellant stated he made it voluntarily and with knowledge it could be used against him in a deportation proceeding, appellant's only allegations are that he had not understood two of the questions and that consequently his answers had been inaccurate and that the immi-

gration officers copied information into this statement from his record of arrival (Ex. 2). The two questions which he alleged he had not understood had no bearing whatsoever on the deportation charges and consequently he could not possibly have been prejudiced by his answers thereto in the statement (Immig., Hearing p. 7, 8). The transcript of the deportation hearing reveals further that appellant's record of arrival (Ex. 2) was used by the immigration officers to supplement his sworn statement only to the extent of copying the names of appellant's wife and children (Immig., Hearing p. 16). This action cannot be deemed prejudicial to appellant. But again, in any event, appellant's deportability does not depend upon the admissibility or inadmissibility of this statement (Ex. 3), nor upon the introduction into evidence of appellant's record of arrival in this country (Ex. 2). Appellant's own testimony at his deportation hearing firmly establishes his deportable status (Immig., Hearing pp. 18-20) and all other evidence, while independently probative and sufficient to sustain deportation, is merely cumulative.

Appellant's contention that the Special Inquiry Officer exceeded the scope of direct examination in his cross-examination of petitioner is totally without merit. Section 242 (b) of the 1952 Act expressly grants to the Special Inquiry Officer the right to cross-examine and, in inquiring of appellant as to his arrival, status and stay in the United States, the Special Inquiry Officer did not exceed the scope of direct examination wherein questions concerning the exhibits in evidence had been asked. Assuming *arguendo*, however, that the scope of direct examination was exceeded, the hearing would not be vitiated so long as reason and fairness obtained. *Bilokumsky v. Tod*, 263 U. S. 149, 157 (1923).

In conclusion, it should be noted that two other exhibits were received in evidence at the deportation hearing which were in and of themselves substantial, reasonable and probative evidence and sufficient to support the Special Inquiry Officer's decision that appellant was deportable. See *Navarrette-Navarretta v. Landon*, 223 F. 2d 234, 237 (9th Cir. 1955). Exhibit 4 is a written request by appellant to the Service office at Buffalo for permission to depart voluntarily prior to the

commencement of the deportation hearing. See 8 C. F. R. § 242.41 (1952). Appellant thus admitted his own status as a deportable alien unlawfully in the United States. Moreover, Exhibit 5, received in evidence at the deportation hearing and such receipt not challenged on appeal, is a printed form entitled: "Application to Extend Time of Temporary Stay" (Immig., Ex. 5). In this application, executed by appellant on July 26, 1955, appellant states that (1) he is a citizen of Portugal (2) he came to the United States as a "commercial visitor" (3) he was admitted into the United States on July 15, 1955 for a period of 15 days (4) he intended to depart on September 30, 1955 and (5) he requests an extension of stay for two months. The information set forth, without more, established the fact that appellant was an alien in the United States who had been admitted temporarily on business and raised the presumption that appellant had overstayed his leave in this country. Appellant introduced no evidence to the contrary. See 8 U. S. C. § 1361 (1952). It is submitted that the Special Inquiry Officer's decision that appellant was a deportable alien is overwhelmingly supported by reasonable, substantial and probative evidence.

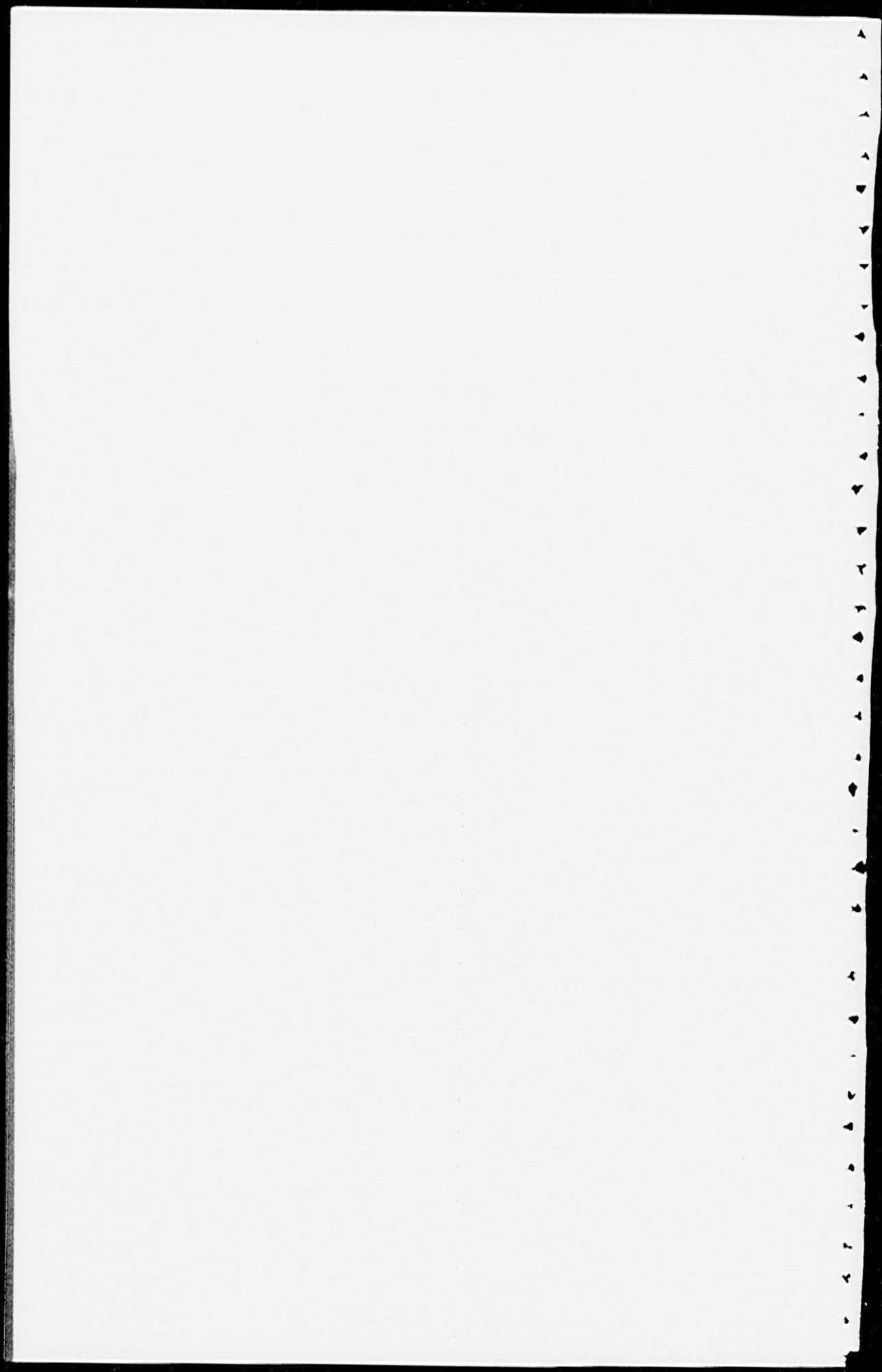
CONCLUSION

Wherefore, it is respectfully submitted that the order of the District Court from which appellant appeals be affirmed and the District Court be directed to dismiss the complaint.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
EDWARD O. FENNELL,
JOHN W. KERN III,

Assistant United States Attorneys.



APPELLANT'S BRIEF AND APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 13,550 FILED

OCT 29 1956

Joseph W. Stewart

MANUEL JOAO COELHO, *Appellant* CLERK

vs.

HERBERT BROWNELL, JR., *Attorney General of the
United States, Appellee*

**Appeal from the Order of the United States District
Court for the District of Columbia.**

LAWRENCE POTAMKIN
1111 E Street, N.W.
Washington, D. C.

Attorneys for Appellant

J. J. KILIMNIK
2204 Pine Street
Philadelphia 3, Pa.
of Counsel

QUESTIONS PRESENTED

1. Where the sole pleadings before the Court were the complaint and motion for preliminary injunction, can the Court make findings of fact and conclusions of law based on the administrative record not properly before the Court?

2. Is is not a denial of a fair hearing and procedural due process to deny a person the right to testify as to the manner of his illegal arrest without a warrant of arrest, to admit a warrant of arrest without identification and to deny pertinent information within the personal knowledge of the Special Inquiry Officer?

3. Is a search and seizure without a warrant valid where an arrest is made without a warrant of arrest under circumstances lacking the statutory prerequisites for such an arrest and can the fruits of such a search be used, admitted in evidence and form the basis for decision?

4. Is a decision based on reasonable, substantial and probative evidence where appellant is not permitted to testify as to the manner of his illegal arrest without a warrant of arrest, contrary to the requirements of a fair hearing and procedural due process?

5. Does a general delegation of authority to the Attorney General to appoint employees of the Immigration and Nationality Service give the Commissioner of Immigration and Naturalization specific authority to appoint Special Inquiry Officers to conduct hearings under the Act?

INDEX

	Page
Questions Presented	i
Jurisdictional Statement	1
Statement of the Case	2
Statutes Involved	4
Statement of Points	5
Summary of Argument	6
Argument	7
Point I. The sole pleadings before the Court were the complaint and motion for preliminary injunction but the court below made findings of fact and conclusions of law based upon the record of the hearing before the special inquiry officer which was not before the Court.	7
Point II. The hearing was conducted contrary to Section 242(b) (3) of the Immigration and Nationality Act.	8
Point III. The appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a search and seizure warrant.	12
Point. IV. The decision of the special inquiry officer was not based upon reasonable, substantial and probative evidence as required by Section 242(b) (4) of the Act.	17
Point V. There is no specific authority in the Immigration and Nationality Act for appointment of a special inquiry officer by the Commissioner of Immigration and Naturalization.	20
Appendix	23

C I T A T I O N S

<i>Cases:</i>	Page
Bento, Manuel Nunes, A-7948051 (4-5-54) (Board of Immigration Appeals)	9
District of Columbia v. Little, 178 F. 2d 13, affirmed 339 U. S. 1	14
Jefferson v. United States, 187 F. 2d 498, affirmed 342 U. S. 48, 50, 51	14
Marcello v. Bonds, 249 U. S. 303 (1955)	8
Rupino-Soares, Juan, A-10245382 (7-18-56) (Board of Immigration Appeals)	9
St. Joseph Stockyards v. United States, 298 U. S. 38	14
Taylor v. United States, No. 13, 306 (decided Oct. 25, 1956)	16
United States v. Alberti, 120 F. Supp. 171, 173, 174	15, 20
United States v. Blok, 188 F. 2d 1019	14
United States v. Broadway Arrington, 215 F. Supp. 630	15
United States v. 5 Gambling Devices, 199 F. Supp. 641	15, 20
United States v. Office #508 Ricou-Brewster Bldg., 119 F. Supp. 24, 28	15, 20
United States v. O'Rourke, 213 F. 2d 759, 753 ...	15
United States v. Reckis, 119 F. Supp. 687, 690 ..	15, 20
Wrightson v. United States, 223 F. 2d 556	15

Statutes:

Administrative Procedure Act, 5 U.S.C. 1001 et seq.	2
Declaratory Judgment Act, 28 U.S.C. 2201	2
Immigration and Nationality Act of 1952	
Section 103(a)	20
Section 242(b) (3)	3, 4, 5, 8, 12
Section 242(b) (4)	4
Section 287(a) (2)	5, 7, 12

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,550

MANUEL JOAO COELHO, *Appellant*

vs.

HERBERT BROWNELL, JR., *Attorney General of the
United States, Appellee*

**Appeal from the Order of the United States District
Court for the District of Columbia.**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the order of the District Court dated August 27, 1956, denying appellant's motion for a preliminary injunction.

Appellant seeks a stay of proceedings pending the determination of his complaint in the form of an action for declaratory judgment and review under the Administrative Procedure Act, declaring the deportation proceedings null and void because of the illegality of his arrest without a warrant of arrest and the illegal seizure of certain docu-

ments without a search and seizure warrant, one of which documents, a record of arrival in the United States, was used and improperly admitted into evidence. Also involved is the failure to afford a hearing in conformance with Section 242(b) (3) of the Act, the lack of due process of law in the apprehension of appellant, the admissibility of a record of sworn statement, the refusal of the special inquiry officer to permit the examination of appellant by his counsel on the manner of his illegal arrest without a warrant of arrest, the lack of specific authority for the appointment of special inquiry officers under the Act, the refusal of the special inquiry officer to furnish information as to the extent of control over him by the District Director and the resultant applicability of the Administrative Procedure Act. Together with the complaint, the appellant filed a motion for preliminary injunction which the Court below denied.

The jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001 et. seq.).

STATEMENT OF THE CASE

Appellant filed a complaint in the form of an action for declaratory judgment and review, alleging that deportation proceedings were instituted against him on the charge that, at the time of his entry, he was an immigrant not in possession of an immigrant visa. At the hearing, an additional charge was lodged against him that he overstayed his leave as a visitor for business. The appellant alleged certain procedural defects, such as the failure to comply with the Administrative Procedure Act in the appointment of a hearing examiner, that there is no specific authority granted to the Commissioner of Immigration and Naturalization or the Attorney General by the Immigration and Nationality Act to appoint special inquiry officers to conduct deportation proceedings and that the hearing

violated Section 242(b) (3) of the Act. Appellant also alleged that the special inquiry officer refused to furnish necessary information as to the identity of his superior officer who rated him, had the power to increase or decrease his salary and affect the conduct of the hearing in any way, or of the person or persons who had the duty of assigning cases to him for hearing.

Appellant also alleged that he was illegally arrested by an immigration officer without a warrant of arrest and that he was illegally searched without a search and seizure warrant as a result of which certain documents were illegally obtained from him from which information was obtained which led to the deportation proceedings. He also alleged that the documents so illegally seized were used at the hearing. One of the documents, a record of arrival, was improperly admitted into evidence. The appellant alleged that his arrest was without due process of law and in violation of the 4th Amendment of the Constitution of the United States. Appellant also alleged that a record of sworn statement was illegally admitted into evidence although no interpreter was present at the time the statement was allegedly obtained and appellant could not fully understand the officer who interrogated him. Appellant was not warned that he need not answer any questions or that any statement he made must be voluntary. The appellant also alleged that the record of sworn statement was prepared by an immigration officer from the documents illegally seized from him. He also alleged that the special inquiry officer improperly excluded testimony of the appellant as to the illegality of the arrest without a warrant of arrest. Appellant alleged that he was compelled to surrender certain documents, to wit, a passport, card of identity, military record and criminal register certificate, to the immigration officer who had no warrant for his arrest and no search and seizure warrant. Appellant alleged that the surrender of these documents was not voluntary and was made while the appellant was in fear of the immigration officer, who was in uniform and armed. He also alleged that

he was deprived of due process of law under the 5th Amendment, and that he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States.

The appellant also filed a motion for preliminary injunction. The District Court below granted a temporary restraining order pending the hearing of the motion for preliminary injunction. The motion was heard by the Court below.

The appellee filed no answer to the complaint and no other pleading. The appellee did file a memorandum in opposition to the appellant's motion for preliminary injunction, to which he attached the Immigration and Naturalization file in the instant case. No offer was made to enter the file into evidence at the time of oral argument.

The Court below made findings of fact and conclusions of law based on the complaint, motion for preliminary injunction and the Immigration and Naturalization file.

STATUTES INVOLVED

Immigration and Nationality Act of 1952, Section 103(a).

Immigration and Nationality Act of 1952, Section 242(b) (3) :

"the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government;"

Immigration and Nationality Act of 1952, Section 242(b) (4) :

"no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

Immigration and Nationality Act of 1952, Section 287(a) (2) :

"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;"

STATEMENT OF POINTS

I. The lower court's findings of fact and conclusions of law were based upon the record of the hearing before the Special Inquiry Officer of the Immigration and Naturalization Service which was not before the Court, since it was not offered in evidence. The sole pleadings and record before the lower court were the complaint and motion for preliminary injunction.

II. The hearing was conducted contrary to Section 242(b) (3) of the Act. When appellant's counsel sought to elicit pertinent information from the Special Inquiry Officer, it was refused. When request was made for the testimony of the arresting officer, it was denied. Appellant was prevented from testifying as to the manner of his illegal arrest without a warrant of arrest. A warrant of arrest was admitted into evidence without identification.

III. The appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a warrant of search and seizure. The prerequisites for an arrest without a warrant did not exist. Absent a valid arrest, the search and seizure was illegal.

IV. The decision of the Special Inquiry Officer was not based upon reasonable, substantial and probative evidence. The refusal of the Special Inquiry Officer to permit appellant's testimony as to the manner of his illegal arrest without a warrant of arrest deprived him of a fair hearing and procedural due process.

V. There is no specific authority in the Immigration and Nationality Act for the appointment of a Special Inquiry Officer by the Commissioner of Immigration and Naturalization. A general delegation of authority to the Attorney General does not include the re-delegation of power to the Commissioner to appoint Special Inquiry Officers.

SUMMARY OF ARGUMENT

The Court erred in denying the preliminary injunction where the sole pleadings before the Court were the complaint and motion for preliminary injunction and the complaint set forth serious allegations of the denial of fundamental constitutional rights.

Due process is denied:

A. Where the special inquiry officer refused to furnish pertinent and relevant information as to the extent and control over him by the District Director;

B. Where the special inquiry officer refused to call the arresting officer as a witness so that he could be examined as to the manner of the illegal arrest and illegal search of the appellant and where he refused to permit counsel to examine the appellant on the manner of his illegal arrest;

C. Where the special inquiry officer improperly restricted counsel in examining the appellant to the sole question as to his voluntary dealings with the Immigration Service;

D. Where the special inquiry officer admitted into evidence a warrant of arrest without identification.

Appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a search and seizure warrant, contrary to the provisions of Section 287(a)(2) of the Immigration and Nationality Act.

The decision of the special inquiry officer was not based upon reasonable, substantial and probative evidence, since the information for the institution of proceedings against appellant was obtained from documents illegally seized from him without a warrant of search and seizure after an illegal arrest without a warrant of arrest.

There is no specific authority in the Immigration and Nationality Act for the appointment of a special inquiry officer by the Commissioner of Immigration and Naturalization.

ARGUMENT

I. The sole pleadings before the Court were the complaint and motion for preliminary injunction but the court below made findings of fact and conclusions of law based upon the record of the hearing before the special inquiry officer which was not before the Court.

The sole pleadings before the Court below were the complaint and motion for preliminary injunction. The Immigration and Naturalization file was not part of the record. No testimony was taken. The findings of fact and conclusions of law of the Court below, based as it was upon the said pleadings and also upon the Immigration and Natu-

ralization file, were procedurally defective. However, should this Honorable Court consider the Immigration and Naturalization file a proper part of the record in this case, then appellant makes the following argument:

II. The hearing was conducted contrary to Section 242(b)(3) of the Immigration and Nationality Act.

A. The special inquiry officer refused to answer pertinent questions by counsel as to the person or persons who rated him, had control over the increase or decrease of his salary, and the person or persons who had the duty of assigning cases to him. These questions were perfectly proper and were consonant with the decision in *Marcello v. Bonds*, 249 U. S. 303 (1955). The determination by the Supreme Court that the special inquiry officer was not under the control of the local District Director was based on the fact that no testimony was offered or presented on that particular issue. Counsel endeavored to elicit information on that point, which the special inquiry officer was particularly competent to furnish. His failure to do so is reversible error.

B. The special inquiry officer refused to call upon the arresting officer to testify as a witness in the case so that counsel for appellant could examine the officer on the manner of the illegal arrest and illegal search of the appellant. He also refused to permit counsel to examine the appellant on the manner of his illegal arrest, but limited the scope of the examination solely to the involuntary character of his dealings with the Immigration Service.

(Pages 4, 5, notes of testimony)

"BY COUNSEL:

May I at this time respectfully request that the officer or officers who served the warrant on the respondent and the officer or officers who initially ar-

rested the respondent and took him into custody be produced as witnesses in this case.

BY SPECIAL INQUIRY OFFICER:

For what purpose?

BY COUNSEL:

For the purpose of questioning them in connection with the arrest of the respondent, which I am informed was made without a warrant of arrest and the respondent was illegally arrested without a warrant of arrest and the respondent was illegally searched without a search and seizure warrant and certain documents taken from him which led to the institution of these proceedings.

BY SPECIAL INQUIRY OFFICER:

Testimony intended to prove the illegality of the arrest in my opinion, is immaterial and will not be received."

It is respectfully submitted that this action was directly contrary to the decision of the Board of Immigration Appeals in the case of *Manuel Nunes Bento*, A-7948051, decision dated April 5, 1954, where the Board stated: ". . . denial of opportunity to question the respondent relative to the manner in which he was arrested . . . is prejudicial because otherwise counsel would be unable to lay the foundation of alleged illegality in the arrest of the respondent".

The Board has recently reiterated its position on this particular point in the matter of *Juan Rupino-Soares*, A-10245382, in its decision dated July 18, 1956. However, the Court's attention is called to the fact that the Attorney General overruled the Board and held that the restriction was proper.

C. The special inquiry officer restricted counsel in examining the appellant to the sole question as to his voluntary dealings with the Immigration Service.

(Pages 11, 12, notes of testimony)

"COUNSEL TO RESPONDENT:

Q. Mr. Coelho, do you remember the time when you were arrested by the immigration officers, when you were first arrested? A. I do.

Q. Where were you at that time? A. At work.

Q. Where? A. In Silver Creek.

Q. In what state? A. New York.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Q. Mr. Kilimnik, will you state briefly, what you offer or intend to prove by this line of testimony? A. Yes, Mr. Speiser. I offer to prove by the respondent that he was illegally arrested without a warrant of arrest and that he was illegally searched without a search and seizure warrant and that as a result of this illegal search certain documents were obtained from the respondent by the immigration officers to the respondent without a warrant of arrest which led to the institution of these proceedings—in these deportation proceedings against him.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Q. Well, it is my ruling that all questions relating to the illegality of arrest, in and of itself, is immaterial and will be excluded. However, I shall permit questions which are designed expressly to establish that any of the actions of the respondent in his dealings with immigration officers, was involuntary. Do you understand the nature of my ruling? A. Yes sir. I presume sir, that your ruling would cover any question of voluntary action in this part from the moment when he was taken

into custody and arrested up until . . . covering the exclusion of these documents.

BY SPECIAL INQUIRY OFFICER:

I wish to point out that the mere fact, if established that his arrest was illegal, that fact is irrelevant to these proceedings, but you may question the respondent regardless of the illegality of the arrest, to establish that any actions on his part in dealing with Service officers, were involuntary."

This was an unwarranted restriction contrary to Section 242(b) (3) of the Act.

D. The special inquiry officer admitted into evidence a warrant of arrest without indentification.

(Pages 1, 2, notes of testimony)

"SPECIAL INQUIRY OFFICER TO RESPOND-
ENT:

Q. I show you a warrant of arrest issued by this Service on November 2, 1955 and ask you whether a copy of this warrant was delivered to you on or about the date mentioned? A. Yes.

Q. Mr. Coelho, this warrant charges that you are liable to deportation from the United States because at the time of your entry on July 15, 1955 you were an immigrant not in possession of immigrant visa or other equivalent document. Do you understand the nature of the charge contained in the warrant of arrest? A. Yes, I understand.

SPECIAL INQUIRY OFFICER TO COUNSEL:

Q. Mr. Kilimnik, is there any objection to the receipt of this warrant in evidence? A. Yes, I object to the receipt and the admission in evidence of this warrant unless the officer or officers who served the warrant and the officer or officers who initially took

the respondent in custody and arrested him be produced as witnesses in this case.

BY SPECIAL INQUIRY OFFICER:

The objection is overruled and the warrant will be received in evidence and marked *EXHIBIT # 1.*"

This was contrary to Section 242(b) (3) of the Act in that no witness was presented to identify the document.

III. The appellant was illegally arrested without a warrant of arrest and certain documents were illegally seized from him without a search and seizure warrant.

While the record is incomplete because of the restriction by the special inquiry officer upon counsel's right to examine the appellant on the manner of his illegal arrest, it is undisputed that the appellant was arrested without a warrant of arrest. There is nothing of record to indicate that the prerequisites for the arrest without a warrant were present in this particular case. These prerequisites are set forth in Section 287(a) (2) of the Immigration and Nationality Act, which provides as follows:

"Sec. 287 (a). Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

* * * * *

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his delay for examination before an officer of the Service having authority

to examine aliens as to their right to enter or remain in the United States;"

However, there is no evidence that the appellant's presence at the place of his arrest provided the necessary prerequisites contained in that section for a valid arrest without a warrant. On the contrary, the appellant's testimony shows no basis for his arrest without a warrant.

The appellant did not, in the presence or view of the officer, enter or attempt to enter the United States in violation of any law or regulation, nor did the officer, at the time he first saw the appellant, have any knowledge or have reason to believe that the appellant was in the United States in violation of any law or regulation and was likely to escape before a warrant could be obtained.

Lacking these prerequisites to an arrest without a warrant, the officer had no authority to make such an arrest under the circumstances.

It is contended with equal vigor that appellant's arrest without a warrant being illegal, the obtaining of the documents from the appellant in the manner testified to by him was in violation of the 4th Amendment of the Constitution of the United States.

The 4th Amendment of the Constitution of the United States provides:

"the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is to be noted that the right referred to in the Amendment pertains to "the people", not merely to citizens. The protection of this right should therefore be accorded to non-citizens as well.

The circumstances of this arrest indicated a clear violation of constitutional rights. As the Court said in *St. Joseph Stockyards v. The United States*, 298 U. S. 38, at page 52:

"But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place these rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. The principle applies when rights either of persons or property are protected by constitutional restrictions."

The provisions of the 4th Amendment regarding searches precludes searches by Government officers without a warrant, regardless of whether the officers are searching for evidence of crime or whether they are searching for something else or just searching. *District of Columbia v. Little*, 178 F. 2d 13, affirmed 339 U. S. 1.

In *United States v. Blok*, 188 F. 2d 1019, a search of a Government clerk's desk by police without a warrant of arrest and without a search and seizure warrant was held to be in violation of the 4th Amendment.

In *Jefferson v. United States*, 187 F. 2d 498, the rule denying the use of evidence seized in the course of a search made without warrant was re-affirmed. In affirming the opinion of the Court of Appeals, the Supreme Court in 342 U. S. 48, 50, 51 said:

"We agree with the Court of Appeals that the seizure was made in violation of the 4th Amendment and on motion of plaintiff its fruits should have been excluded as evidence on his trial.

The 4th Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection

extends to both 'houses' and 'effects'. Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes."

"Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure."

Aliens, so long as they are permitted to remain in the United States, are entitled to the protection of its Constitution and laws with respect to their rights of person and of property and to their civil and criminal responsibility. *United States v. O'Rourke*, 213 F. 2d 759, 763. These rights include the right to freedom from illegal search and seizure under the Fourth Amendment of the Constitution of the United States, which may be asserted in civil as well as criminal cases.

Other cases on this subject are *United States v. Broadway Arrington*, 215 F. Supp. 630 and *Wrightson v. United States*, 222 F. 2d. 556.

Whether or not there was a waiver of the constitutional privilege against search and seizure is a question of fact to be determined by the Court. There was no consent on the part of the plaintiff to this interrogation and there was certainly no waiver of his constitutional privilege against an unlawful search and seizure of any personal document or documents. *United States v. 5 Gambling Devices*, 119 F. Supp. 641; *United States v. Office #508 Riccu-Brewster Bldg.*, 119 F. Supp. 24, 28; *United States v. Reckis*, 119 F. Supp. 687, 690; *United States v. Alberti*, 120 F. Supp. 171, 173, 174.

The appellant was arrested while at work. A statement (record of sworn statement) was taken from him on November 1, 1955. (Page 6, notes of testimony)

"Special Inquiry Officer to Respondent:

Q. I am showing you a record of a sworn statement which appears to have been made under oath on November 1, 1955, and ask you whether you signed this document?"

A warrant of arrest was not issued until November 2, 1955 (p. 11, supra.), the day after he had been taken into custody. No search warrant was issued. There is no evidence to indicate why the officer arrested appellant without a warrant since the appellant was not permitted to testify on that point and the officer who made the arrest did not appear and testify.

The factual situation is most similar to *Valerio v. Mulle, Acting District Director, Immigration and Naturalization Service*, Civil Action No. 18279, United States District Court, Eastern District of Pennsylvania, where the Honorable Allen R. Grim denied the government's motion for summary judgment. (Appendix 36).

A similar ruling was made in *Costa v. Mulle, Acting District Director, Immigration and Naturalization Service*, Civil Action No. 18280, United States District Court, Eastern District of Pennsylvania, by Judge Grim under a similar factual situation.

A contrary ruling was made in the case of *Diogo v. Zimmerman, District Director, Immigration and Naturalization Service*, Civil Action No. 16680, United States District Court, Eastern District of Pennsylvania, by the Honorable George A. Welsh. (Appendix 39).

The denial of constitutional rights raise substantial questions which require hearing and adjudication. There was no waiver of these rights in the instant case and the presumption is against such a waiver. This Honorable Court, on October 25, 1956, held in the case of *Taylor v. United States*, No. 13, 306, that:

"There is to be borne in mind the admonition of the Supreme Court that 'courts indulge every reasonable

presumption against waiver' of 'fundamental constitutional rights' and that 'we do not presume acquiescence in the loss of fundamental rights.' *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)."

In another case involving the allegation of the denial of fundamental constitutional rights (*Juan Pineiro-Lopez v. Herbert Brownell, Jr.*, Civil Action No. 3663-56, United States District Court for the District of Columbia) although the Immigration and Naturalization record did not show the denial of such rights, the Honorable Matthew F. McGuire, United States District Judge for the District of Columbia, on September 15, 1956, referred the case back to the Immigration Service for the resolution of the question of fact with reference to the manner of arrest, saying:

"It is paying tribute to shadow and ignoring substance, when slavish obeisance is made to technical procedural requirements, when basic constitutional safeguards are challenged as not only being ignored but entirely absent."

IV. The decision of the special inquiry officer was not based upon reasonable, substantial and probative evidence as required by section 242(b)(4) of the Act. (P. 4, supra).

The refusal of the special inquiry officer to permit the examination of the appellant as to the manner of his illegal arrest without a warrant of arrest deprived the appellant of a fair hearing and denied him procedural due process. From the limited evidence available, it would appear that his arrest without a warrant had no support from Section 287(a). The seizure of the documents from the appellant clearly indicated that handing over the documents was not a voluntary act.

(Pages 13, 14, notes of testimony):

"COUNSEL TO RESPONDENT:

* * * * *

Q. You went to your house and what happened there?

A. He ordered me to open up my suitcases and to give him the papers which I had there.

Q. Did you do that? A. Yes, we had to do it.

* * * * *

Q. What papers did you give to the officer? A. My passport, my card of identity, a card of identity issued by the military authorities and a certificate of the criminal register.

* * * * *

Q. Would you have given any of these documents to the officer if he were not an officer of the law? A. Well, I could do nothing about that because I was before the authority, the authority with the pistol.

Q. By that do you mean that officer had a pistol in his possession—on his person? A. Yes, he had a pistol.

Q. Was that pistol visible to you? A. Yes, sir.

Q. Was the officer dressed in uniform or plain clothes? A. In uniform.

Q. Did you give these documents to the officer of your own free volition? A. Well, I didn't give him the documents voluntarily. I was afraid.

Q. Would you have permitted the officer to enter your house with you if he was not an officer of the law? A. No.

Q. Did the officer, at any time from the time that you first saw him until—from the time you first saw him, show you any warrant for your arrest? A. No.

Q. Did the officer, at any time from the time you first saw him, show you a warrant of search and seizure authorizing him to take any documents or other property from you? A. No."

With respect to the record of sworn statement, the appellant testified (page 14, notes of testimony) that he

was shown some papers and told to sign them by the immigration officer.

"COUNSEL TO RESPONDENT:

* * * * *

Q. What happened at the immigration office? A. We were told about posting bond; we were shown some papers, and after these papers were prepared we were told 'Sign here' by this police officer. After that we were allowed to go free."

He also testified that the officer who took the statement obtained some of the information from the papers which were illegally seized from him.

(Page 15, notes of testimony)

"COUNSEL TO RESPONDENT:

Q. Do you remember at the time when you were asked these questions which appear on EXHIBIT #3, whether the officer looked at this document, and I am referring to EXHIBIT #2, and your passport, before he filled in the answers to the questions? A. Yes."

The special inquiry officer admitted into evidence form 257, record of arrival.

(Page 6, notes of testimony)

"BY SPECIAL INQUIRY OFFICER:

This Form 257 indicates that Manuel Joao Coelho was admitted to the United States at the Port of New York on July 15, 1955 for business, a period to expire July 30, 1955. The reverse of this document indicates that his stay was thereafter extended until October 2, 1955. The document is received in evidence and marked EXHIBIT #2."

BY COUNSEL:

I object to the admission of this document as evidence on the ground that this document was ob-

tained by the immigration officer who initially took the respondent into custody and arrested him and illegally obtained this document without a warrant of arrest and without a warrant of search and seizure.

BY SPECIAL INQUIRY OFFICER:

Objection is overruled. The document has been received in evidence and marked EXHIBIT #2."

This was a violation of the appellant's rights under the 4th Amendment of the Constitution.

It is, therefore, respectfully submitted that the decision of the special inquiry officer, based as it was upon the record of arrival illegally seized by the immigration authorities, and the sworn statement, which was composed of information obtained from other documents illegally seized from the appellant, was not based upon reasonable, substantial and probative evidence, as required by Section 242(b) (4). *United States vs. 5 Gambling Devices*, supra; *United States vs. Office #508 Ricou-Brewster Bldg.*, supra; *United States vs. Reckis*, supra; *United States vs. Alberti*, supra.

V. There is no specific authority in the Immigration and Nationality Act for appointment of a special inquiry officer by the Commissioner of Immigration and Naturalization.

It is respectfully submitted that there is no specific authority in the Immigration and Nationality Act which grants the Commissioner of Immigration and Naturalization the power to appoint special inquiry officers, other than the general authority granted to the attorney general in Section 103(a):

"To appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer

or employee of the Department of Justice in his discretion any of the duties and power imposed upon him in this Act."

Nothing in the quoted section grants specific authority to the Commissioner of Immigration and Naturalization to himself appoint special inquiry officers to conduct deportation hearings. In the absence of this specific authority, the only basis for any officer of the Immigration and Naturalization Service to conduct deportation hearings would be an appointment as an examiner under the provisions of the Administrative Procedure Act.

It is, therefore, respectfully submitted that the proceedings should be remanded to the Immigration and Naturalization Service in order that a full and fair hearing be accorded to the appellant, and that a stay of proceedings should be granted pending this action.

Respectfully submitted,

LAWRENCE POTAMKIN,

Attorney for Appellant

JACOB J. KILIMNIK,
Of Counsel.

APPENDIX

INDEX

	Page
Petition for Stay of Proceedings.....	23
Complaint	27
Motion for Preliminary Injunction and Affidavit ...	33
Findings of Fact and Conclusions of Law	34
Order	35
Opinion (Grim, J.—U.S.D.C., E.D. of Pa.)	36
Opinion (Welsh, J.—U.S.D.C., E.D. of Pa.)	39

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 13,550

MANUEL JOAO COELHO, *Appellant*

vs.

HERBERT BROWNELL, JR., *Attorney General*
of the United States, Appellee

Appeal from the Order of the United States District Court
for the District of Columbia.

PETITION FOR STAY OF PROCEEDINGS

TO THE HONORABLE, THE JUDGES OF SAID
COURT:

The petition of Manuel Joao Coelho, by his attorney,
Lawrence Potamkin, respectfully represents:

1. That your appellant filed action for declaratory judgment under the Declaratory Judgment Act and for review under the Administrative Procedure Act of the deportation order issued by Edw. J. Shaughnessy, District Director, Immigration and Naturalization Service, New York, New York, acting under the direction and control of the appellee, Herbert Brownell, Jr., Attorney General of the United States;

2. That the said action was filed by reason of the order by the said Edw. J. Shaughnessy, District Director, Immigration and Naturalization Service, New York, New York, that the appellant report to the New York Office of the Immigration and Naturalization Service for deportation on August 20, 1956;

3. That in conjunction with the action for declaratory judgment and review, appellant filed a motion for preliminary injunction, restraining the appellee from deporting the appellant, pending determination of said action;

4. That on August 17, 1956, the Honorable Burnita Shelton Matthews granted appellant's oral motion for a temporary restraining order pending hearing of the motion for preliminary injunction;

5. That on August 27, 1956, the Honorable Edward M. Curran dismissed the motion for preliminary injunction;

6. That on September 5, 1956, appellant filed a notice of appeal from the order dismissing the motion for preliminary injunction and the said appeal was docketed in the office of the Clerk of the Court of Appeals on September 20, 1956;

7. That the defendant has filed no answer to the complaint and no other pleadings;

8. That no testimony was taken by the Court at the time of the hearing, nor was any document or record of any kind submitted;

9. That a copy of the complaint is attached hereto and marked "Exhibit A";

10. That in addition to certain procedural defects in the conduct of the proceedings alleged in the complaint, the following additional allegations are made:

(a) That the appellant was illegally arrested without a warrant of arrest and illegally searched without a search and seizure warrant, as a result of which a certain document was illegally obtained and used and admitted into evidence at the administrative hearing afforded the appellant;

(b) That a record of an alleged sworn statement of the plaintiff was introduced in evidence, although the appellant had testified that there was no interpreter

and that he could not fully understand the immigration officer who interrogated him, nor was he warned that any statement he made must be voluntary;

(c) That the record of alleged sworn statement was prepared by the immigration officers from the document illegally seized from the appellant;

(d) That the special inquiry officer improperly excluded testimony of the appellant as to the illegality of his arrest without a warrant of arrest;

(e) That the appellant was unlawfully compelled to surrender certain documents to the immigration officer arresting him at a time when the appellant was in fear of said officer;

(f) That appellant was deprived of due process of law because he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States;

(g) That all of said questions raised in appellant's complaint are substantial and require determination by the Court;

(h) That unless this Honorable Court grants a stay of proceedings pending the determination of the action for declaratory judgment and review under the Administrative Procedure Act in this appeal, the appellant will be deported from the United States.

WHEREFORE, appellant respectfully prays this Honorable Court to grant a stay of proceedings in the above case, restraining the appellee, Herbert Brownell, Jr., Attorney General of the United States, and his subordinates, from deporting the appellant pending the determination of this appeal.

And your appellant will ever pray, etc.

/s/ LAWRENCE POTAMKIN
Attorney for Appellant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 3428-56

ACTION FOR DECLARATORY JUDGMENT
AND REVIEW

MANUEL JOAO COELHO, *Plaintiff*
6 West 2nd Street

vs.

HERBERT BROWNELL, JR., *Attorney General*
of the United States, Defendant

COMPLAINT

The plaintiff, by his attorneys, respectfully alleges:

1. That this is an action for declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001 et seq.).

2. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be deported from the United States.

3. That deportation proceedings were instituted against the plaintiff on the charge that, at the time of entry, plaintiff was an immigrant not in possession of an immigrant visa, or other equivalent document. At the hearing, an additional charge was lodged against plaintiff that, under Section 241(a)(2) of the Immigration and Nationality Act, after his admission to the United States as a visitor for business, pursuant to Section 101(a)(15)(B) of the Act, he remained in the United States for a longer period than authorized.

4. That a hearing was held on March 16, 1956, at New York City, New York, before Special Inquiry Officer Reuben Speiser, at the conclusion of which the Special Inquiry Officer found that the plaintiff was not subject to deportation on the ground that he did not have an immigrant visa at the time of his entry, but that he was subject to deportation on the ground that after his admission as a visitor for business, he remained in the United States for a longer period than authorized, and, thereupon, the said Special Inquiry Officer entered an order that the plaintiff be deported from the United States.

5. That the plaintiff's appeal from the said order of the Special Inquiry Officer was dismissed by the Board of Immigration Appeals on May 25, 1956.

6. That all administrative proceedings have been finally concluded.

7. That the deportation hearing granted to the plaintiff was conducted by a Special Inquiry Officer not appointed as an Examiner in conformity with the Administrative Procedure Act and the said Special Inquiry Officer was subject to the control of superior officers including the District Director who engaged in prosecuting and investigatory functions.

8. That Section 11 of the Administrative Procedure Act provides for the appointment of qualified Examiners by the Civil Service Commission.

9. That the plaintiff believes and, therefore, avers that the Special Inquiry Officer who conducted the within proceedings in the Immigration and Naturalization Service was not appointed and qualified by the Civil Service Commission as an Examiner under Section 11 of the Administrative Procedure Act.

10. That the hearing conducted by the said Special Inquiry Officer in violation of Section 11 of the Adminis-

trative Procedure Act diminished the constitutional right of the plaintiff contrary to Section 12 of said act.

11. That the aforesaid hearing was unfair because of failure to comply with the Administrative Procedure Act.

12. That the hearing afforded the plaintiff was in violation of Section 242(b) (3) of the Immigration and Nationality Act of 1952.

13. That the Special Inquiry Officer refused to furnish necessary information as to the identity of his superior officer, or the identity of his superior officer who had the authority to rate him, increase or decrease his salary and affect the conduct of the hearing in any way, or of the person or persons who had the duty of assigning cases to him for hearing. This information was vitally necessary to the plaintiff in order to determine the extent of the control exercised by the District Director or any other officer over the Special Inquiry Officer in the conduct of his hearings.

14. That the plaintiff was illegally arrested by an Immigration Officer without a warrant of arrest.

15. That the plaintiff was illegally searched, in violation of the Fourth Amendment of the Constitution of the United States, and certain documents were illegally taken from him without a search and seizure warrant, as the result of which information was obtained which led to the present deportation proceedings. The documents so illegally seized were used at the hearing by the Examining Officer.

16. That the Arresting Officer failed to obtain a formal warrant of arrest and a warrant of search and seizure in order to lawfully conduct a search of the plaintiff and his residence.

17. That the plaintiff's arrest was without due process of law and in violation of the Fourth Amendment of the Constitution of the United States.

18. That there is no specific authority granted to the Commissioner of Immigration and Naturalization or the Attorney General by the Immigration and Nationality Act of 1952 to appoint Special Inquiry Officers for the purpose of hearing deportation proceedings, and the hearings conducted by a Special Inquiry Officer appointed by the Commissioner of Immigration and Naturalization were, therefore, null and void.

19. That the Special Inquiry Officer used and admitted into evidence Form 257, record of arrival in the United States, although this document was illegally obtained by the Arresting Officer without a warrant of arrest and without a search and seizure warrant.

20. That the Special Inquiry Officer improperly admitted into evidence a record of an alleged sworn statement of the plaintiff although no interpreter was present and plaintiff could not fully understand the officer who interrogated him. The plaintiff was not warned that he need not answer any questions or that any statements he made must be voluntary, all of which was contrary to the Fifth Amendment of the Constitution of the United States.

21. That the Special Inquiry Officer improperly cross-examined the plaintiff on matters not developed in direct examination.

22. That the alleged record of sworn statement was prepared by the Immigration Officers from documents illegally seized from the plaintiff without warrant or arrest and without a search and seizure warrant. The officer was in uniform and armed.

23. That the Special Inquiry Officer improperly excluded testimony of the plaintiff as to the illegality of his arrest without a warrant of arrest.

24. That the plaintiff was unlawfully compelled to surrender certain documents, to wit, a passport, card of

identity, military record and criminal register certificate, to the Immigration Officer, who had no warrant for plaintiff's arrest and no search and seizure warrant. The surrender of said documents was not voluntary and was made while the plaintiff was in fear of the Immigration Officer who was in uniform and armed.

25. That the plaintiff was deprived of due process of law, under the Fifth Amendment of the Constitution of the United States, in that he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that the hearing herein was unfair, null and void;

(b) Declaring that the deportation order herein was null and void;

(c) Restraining the defendant from deporting the plaintiff;

(d) Declaring that the plaintiff was illegally arrested without a warrant of arrest;

(e) Declaring that the plaintiff was illegally searched without a search and seizure warrant and certain documents illegally taken from him contrary to the Fourth Amendment of the Constitution of the United States; declaring that one of said documents was improperly used and admitted in evidence at the hearing.

(f) Declaring that the failure to conduct the hearing pursuant to the provisions of the Administrative Procedure Act made the hearing null and void;

(g) Declaring that the conduct of the hearing by a Special Inquiry Officer not qualified or appointed under the Administrative Procedure Act was a nullity;

(h) Declaring that there is no specific authority granted by the Immigration and Nationality Act of 1952 to the Commissioner of Immigration and Naturalization or the Attorney General to appoint Special Inquiry Officers to conduct deportation proceedings and the hearing conducted by a Special Inquiry Officer appointed by the Commissioner of Immigration and Naturalization was therefore null and void;

(i) Declaring that plaintiff was deprived of due process of law, under the Fifth Amendment of the Constitution of the United States, in that he was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purpose in coming to the United States;

(j) Declaring that the alleged sworn statement of plaintiff was not a voluntary statement made by him and was obtained from him while he was in fear of the Immigration Officer who was in uniform and armed;

(k) Declaring that the refusal of the Special Inquiry Officer to furnish the plaintiff with necessary and important information as to the officer or officers who exercised control over him was a denial of due process of law; and

(l) For such other and further relief as may be appropriate.

/s/ LAWRENCE POTAMKIN

Attorney for Plaintiff

JACOB J. KILIMNIK
Of Counsel

MOTION FOR PRELIMINARY INJUNCTION

The plaintiff, by his attorney, moves the Court for an order granting a preliminary injunction against the defendant, restraining the defendant from apprehending and deporting plaintiff pending determination of this suit, upon the grounds and in accordance with the averments set forth in the complaint.

/s/ LAWRENCE POTAMKIN
Attorney for Plaintiff

JACOB J. KILIMNIK
Of Counsel

AFFIDAVIT

DISTRICT OF COLUMBIA: :
WASHINGTON, D. C. : : ss

J. J. KILIMNIK, being duly sworn, according to law, deposes and says:

1. That he is Of Counsel for the plaintiff in the above entitled action;
2. That, as more fully appears from the complaint filed herein, a final order of deportation has been entered;
3. That the defendant, through his subordinates, has advised the plaintiff that he should report for deportation at the New York Immigration Office on Monday, August 20, 1956, at 9:30 A. M., in complete readiness for deportation;
4. That the plaintiff has never been in conflict with the law, is not a member of any subversive organization. During the entire immigration proceedings, plaintiff has been at liberty on bond. If plaintiff is deported, it will result in irreparable damage and injury to him.

/s/ J. J. KILIMNIK.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for consideration on the plaintiff's motion for a preliminary injunction and the Court having considered the motion with attached affidavit, the opposition thereto, the file of the Immigration and Naturalization Service relating to the plaintiff, File No. A-8839362, the complaint filed herein, and argument of counsel, the Court states its findings of fact as follows:

FINDINGS OF FACT

1. The plaintiff is a native and citizen of Portugal who entered the United States on July 15, 1955 as a visitor for business. He was admitted until July 30, 1955 and thereafter received an extension of stay until October 2, 1955.

2. On March 16, 1956 after a hearing it was concluded that the plaintiff was subject to deportation under the provisions of Section 241(a)(2) of the Immigration and Nationality Act in that after his admission to the United States as a visitor for business he remained in the United States for a longer period than authorized.

3. At the deportation hearing the plaintiff did not contest his deportability but applied for voluntary departure at his own expense in lieu of deportation.

4. The plaintiff was granted voluntary departure at his own expense in lieu of deportation.

5. The plaintiff did not voluntarily depart the United States.

6. The defendant has ordered the plaintiff deported.

7. In this action the plaintiff does not contest his deportability.

The Court states its conclusions of law as follows:

1. The plaintiff is subject to deportation under the provisions of Section 241(a) (2) of the Immigration and Nationality Act in that after his admission to the United States as a visitor for business pursuant to Section 101(a) (15) (b) of the Act he remained in the United States for a longer period than authorized.

2. The plaintiff is not entitled to a preliminary injunction.

/s/ EDWARD M. CURRAN

Judge

August 27, 1956

ORDER

This cause having come on for consideration on the plaintiff's motion for a preliminary injunction and the Court having considered the motion with attached affidavit, the opposition thereto, the file of the Immigration and Naturalization Service relating to the plaintiff, File No. A-8839362, the complaint filed herein, and argument of counsel it is by the Court this 27th day of August 1956

ORDERED that the plaintiff's motion for preliminary injunction be and the same hereby is denied.

/s/ EDWARD M. CURRAN

Judge

OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION No. 18279

MANUEL GUERREIRO VALERIO, *Plaintiff*

vs.

HENRY L. MULLE, *Acting District Director, Immigration
and Naturalization Service, Defendant*

GRIM, J.

October 22, 1956

Plaintiff, an alien, is being held for deportation to his native country. He was arrested and given a hearing before a Special Inquiry Officer of the Immigration and Naturalization Service. The Inquiry Officer ordered him to be deported. He appealed to the Board of Immigration Appeals, which sustained the order of the Inquiry Officer. He has filed this action requesting (1) a declaratory judgment in his favor, (2) a review under the Administrative Procedure Act and (3) an injunction restraining the defendant from deporting him. Defendant has filed a motion for summary judgment in his favor.

No hearing has been held in this court, nor have any affidavits been submitted. The facts in the case have been developed from the testimony which was elicited at the hearing before the Special Inquiry Officer.

Plaintiff entered the United States on April 15, 1953, as a visitor for business, and not as an immigrant, with permission to remain in the United States for a period of three months. No extension of this permission has been granted. Consequently, it is clear that plaintiff is in the United States without permission and is subject to deportation. Because of this defendant contends that summary judgment should be entered in his favor.

Plaintiff does not contend that he is in this country validly, but he contends that the motion for summary judgment against him should be denied because of alleged procedural defects in the deportation proceedings, one of the alleged defects being that plaintiff was arrested without a warrant.

The facts of plaintiff's arrest are: On April 22, 1954, plaintiff was approached by two immigration officers while he was working at his job as a laborer and asked by them when he entered the United States. They also asked him for his "documents." Plaintiff told them that he did not have his "documents" with him, but that they were in the room in which he lived. The officers and plaintiff then proceeded together to plaintiff's room where plaintiff gave them his passport. The officers immediately put him under arrest. No warrant for plaintiff's arrest was issued until April 23, 1954, which was the day after he had been taken into custody. No search warrant has ever been issued.

It is provided in the Immigration and Nationality Act of 1952 that an immigration officer without a warrant is authorized: (8 U.S.C.A. Sec. 287(a)(2))

" . . . to arrest any alien within the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest. . . ."

The officers clearly had a right to arrest plaintiff without a warrant if they had reason to believe (as evidently they did) that he was in the United States in violation of the immigration laws and if it reasonably appeared to them that he might escape before a warrant could be obtained. The evidence in respect to why the officers arrested without a warrant is not very clear. The only witness at the hearing before the Inquiry Officer was the plaintiff. Neither of the arresting officers testified. There is nothing to indicate

that plaintiff would have escaped if the officers had not made the arrest until after they had obtained a warrant. Under the circumstances it would be unwise to grant defendant's motion for summary judgment without ordering a hearing in the case, at least to look into the question as to why the arresting officers made the arrest a day before they obtained a warrant.

A defect in the original arrest of an alien will not necessarily void a deportation proceeding. *United States ex rel. Bilokumsky v. Tod*, 263 U. S. 149, 158, *D'Agostino v. Shali*, 230 F. 2d 668, 671. However, it should be remembered that aliens in the United States are entitled to the protection of its constitution and laws with respect to their rights of person and property and they are entitled to this protection under certain circumstances, in both criminal and civil proceedings against them. *Fong Yue Ting v. United States*, 148 U. S. 698, 724, *United States v. O'Rourke*, 213 F. 2d 759, 763.

To support his motion for summary judgment defendant relies on the case of *Tsimouris v. Holland*, 228 F. 2d 907, 132 F. Supp. 754 (Judge Clary). The *Tsimouris* case is quite similar to the present case but it is distinguishable in that in the *Tsimouris* case the facts do not show that the alien was arrested a substantial time before a warrant of arrest was obtained. Besides, unlike the present case, a hearing had been held before the court in the *Tsimouris* case, thereby giving the court a good opportunity to obtain all the facts of the case including the manner in which the arrest was made.

Defendant's motion for summary judgment in his favor will be denied.

/s/ ALLAN K. GRIM, J.

OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION No. 16680

JOSE DIOGO, *Plaintiff*

vs

KARL I. ZIMMERMAN, *District Director,*
Immigration and Naturalization Service, Defendant.

WELSH, J.

September 26, 1956

This complaint is for review under the Administrative Procedure Act, 5 U. S. C. Section 1001 et seq., and for declaratory judgment under the Declaratory Judgment Act, 28 U. S. C. Section 2201. Defendant's motion for summary judgment is presently before the Court.

On December 13, 1951, plaintiff was working in Chester, Pennsylvania, on a bridge construction job for the Berlante Construction Company. In the afternoon of said day, he was called to the superintendent's office together with a fellow employee who could speak both English and Portuguese. A gentleman who identified himself as a member of the Immigration Service then interrogated the plaintiff as to the date and facts surrounding his entry into the United States. After a short interval, the Immigration Officer asked the plaintiff to accompany him to the plaintiff's hotel room. The Immigration Officer and the plaintiff were accompanied at all times by the fellow employee, Jose Teixeira, who acted as interpreter, the plaintiff being unable to speak English. The Officer took both men in the Officer's car to the hotel where the plaintiff then resided.

The plaintiff opened the door to his room and walked in followed by the other two men and was told by the Officer to change his clothes and pack his belongings, that

he was leaving for Philadelphia, Pennsylvania. The Officer asked for plaintiff's documents and the plaintiff handed him his passport and military service record. The Officer kept the passport and returned the military service record.

The three men then proceeded to Philadelphia where the plaintiff executed a sworn statement setting forth the facts.

At Philadelphia, a Warrant of Arrest was issued by Henry L. Mulle, Acting District Director of the Immigration Service, whereby the plaintiff was arrested for a violation of the Immigration Act of May 26, 1924, in that he had remained in the United States after failure to maintain the exempt status under which he had been admitted as a visitor for business.

A Warrant Hearing was conducted on January 25, 1952, at Philadelphia before Special Inquiry Officer, Willard S. Layton, at which time the plaintiff was represented by counsel. From testimony at said hearing it developed that the plaintiff entered the United States on September 9, 1951, at New York via airplane from Portugal and came purely for business purposes; he was admitted for a period of two months' time within which to carry on that business and he never applied or received an extension of his temporary stay. He accepted gainful employment in the United States one day after arrival and was still employed at the time of his arrest.

As a result of the hearing the plaintiff was ordered to be deported under the charge stated in the Warrant of Arrest and plaintiff's counsel subsequently took all necessary administrative appellate procedures.

1. Plaintiff contends that the procedures under the Administrative Procedure Act, 5 U. S. Section 1001 et seq., apply to hearings of the type involved here. However, in the case of *Marcello v. Bonds*, 349 U. S. 302, the Supreme Court held that a deportation hearing conducted under the Immigration and Naturalization Acts need not comply

with the requirements of the Administrative Procedure Act. This holding has recently been reaffirmed in the Third Circuit in the case of *Costas Tsimouris v. S. W. Holland*, District Director, Immigration and Naturalization Service, 228 F. 2d 907, and therefore plaintiff's position is manifestly not well taken.

2-4. Plaintiff next contends that without a warrant plaintiff's arrest and search and seizure was illegal. Under 8. U. S. C. Section 1357(a) (1) (2), an Immigration Officer is authorized without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest". Thus, there is statutory authority for the original interrogation on December 13, 1951 and for the subsequent arrest since it developed that there was a possibility the plaintiff had overstayed his legal time in the United States which had expired on October 5, 1951.

As to the contention that the grant of authority contained in Section 1357 is unconstitutional, it is observed that it was rejected by the U. S. Court of Appeals for the Third Circuit as "being wholly lacking in merit" in the case of *United States v. Correia*, 207 F. 2d 595. See also *Taylor v. Fine et al.*, 115 Fed. Supp. 68.

With respect to the search and seizure of documents here it is clear from plaintiff's own testimony that the same were not illegal and that all documents kept by the Officer were voluntarily given to him by the plaintiff.

5-6. Finally, plaintiff contends that the Arresting Officer did not testify as to the facts of the arrest or as to the facts relative to the execution of plaintiff's affidavit. The factual situation concerning the arrest was testified to by the plaintiff himself and was sufficient to support the

finding of the Hearing Officer. The plaintiff was not prejudiced by the failure of the Arresting Officer to corroborate his testimony in that respect.

The introduction of the sworn statement of the plaintiff was not error since, prior to its admission as evidence, the plaintiff himself identified it as a document which he had executed and which was correct.

7. In conclusion, no genuine issues of fact existing and all issues of law having been resolved in favor of the defendant, the motion of the defendant for summary judgment will accordingly be granted.

An order pursuant to the foregoing opinion will be prepared and submitted.

No. 13550

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANUEL JOAO COELHO, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED
STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,

United States Attorney.

LEWIS CARROLL,

EDWARD O. FENNELL,

JOHN W. KERN III,

Assistant United States Attorneys.

[Handwritten signature]
CLERK

QUESTIONS PRESENTED

This appeal is taken from an order entered by the District Court denying appellant's motion for a preliminary injunction to restrain appellee from deporting appellant who had been found administratively to be deportable for the reason that he was an alien admitted temporarily into the United States as a visitor on business who remained here beyond the time authorized for his stay. In the opinion of the appellee, the following questions are presented:

1. Whether the Special Inquiry Officer was justified in refusing to answer questions from appellant's counsel concerning whether the Special Inquiry Officer was under the supervision and control of the District Director of the particular immigration district in which the deportation hearing was held?

2. Whether the Special Inquiry Officer's decision—that appellant was deportable for the reason that he was an alien admitted as a business visitor who remained in the United States beyond the period for which he had been admitted—was based upon reasonable, probative and substantial evidence?

INDEX

Counterstatement	Page 1
Statutes and Regulations	8
Summary of Argument	12
Argument:	
I. The Special Inquiry Officer's Refusal to Reveal the Identity of His Supervisor Was Not Error and His appointment by the Commissioner Is Authorized by Statute	13
II. Appellant's Arrest by Immigration Officers Was Not Illegal and the Decision by the Special Inquiry Officer Was Based Upon Reasonable, Probative and Substantial Evidence	17
Conclusion	22

TABLE OF CASES

<i>Bilokumsky v. Tod</i> , 263 U. S. 149 (1923)	21
<i>Cox v. Democratic Central Committee of the District of Columbia</i> , 91 U. S. App. D. C. 416, 200 Fed. 356 (1952)	13
<i>Deckert v. Independence Corp.</i> , 311 U. S. 282 (1940)	13, 14
<i>Diogo v. Zimmerman</i> , C. A. No. 16680 (E. D. Pa. 1956)	18, 20
<i>Embassy Dairy v. Camalier</i> , 93 U. S. App. D. C. 364, 211 F. 2d 41 (1954)	13
<i>Johnson v. Stevenson</i> , 170 F. 2d 108 (5th Cir. 1948)	14
<i>Marcello v. Bonds</i> , 349 U. S. 302 (1955)	15, 16
<i>Meccano, Ltd. v. John Wanamaker</i> , 253 U. S. 136 (1920)	14
<i>Navarette-Navarette v. Landon</i> , 223 F. 2d 234 (9th Cir. 1955)	21
<i>Smith v. Vulcan Iron Works</i> , 165 U. S. 518 (1897)	13
<i>Tsimounis v. Holland</i> , 132 F. Supp. 754 (E. D. Pa. 1955), aff'd. 228 F. 2d 907 (3rd Cir. 1956)	19
<i>United States v. Correia</i> , 207 F. 2d 595 (3rd Cir. 1953)	18

OTHER REFERENCES

Administrative Procedure Act, § 5 (c), 60 Stat. 239, 5 U. S. C. § 1004 (c) (1952)	15
8 C. F. R. § 9.1 (b) (1952)	17
F. R. Civ. P. 10 (c)	14
Immigration and Nationality Act of 1952, § 291, 66 Stat. 234, 8 U. S. C. § 1361 (1952)	17

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13550

MANUEL JOAO COELHO, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED
STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Judicial Proceedings.

On August 16, 1956, appellant filed in the United States District Court for the District of Columbia a complaint for declaratory judgment and injunctive relief, naming the Attorney General as defendant (App. 27, 32¹). Generally, appellant alleged in this complaint that (1) he had been unlawfully arrested by immigration officers and certain documents had been taken from him without benefit of a search warrant (2) the Special Inquiry Officer before whom the deportation hearing had been held lacked authority to conduct such hearing and (3) the Special Inquiry Officer committed certain errors in the admission of evidence and the conduct of the deportation hearing, which hearing resulted in a finding

¹References in this brief to Appellant's Appendix shall be denoted by the use of App. Since the record on appeal is composed of the entire original record and it has no continuous pagination, references in this brief to papers in the record shall be denoted only by the use of the title and file date of the particular paper.

that appellant was deportable (App. 27-31). Simultaneously with the filing of this complaint, appellant filed a motion for preliminary injunction "against defendant [the Attorney General], restraining the defendant from apprehending and deporting plaintiff [appellant] pending determination of this suit, upon the grounds and in accordance with the averments set forth in the complaint." (App. 33). The Attorney General, the defendant and appellee on this appeal, filed on August 24, 1956, an opposition to appellant's motion for preliminary injunction in which opposition appellee stated: "Attached hereto and made a part hereof is the file of the Immigration and Naturalization Service (File No. A8839362²) relating to plaintiff [appellant] herein."

On August 17, 1956, the District Court, after a hearing, entered an order restraining appellee and his agents from deporting appellant from the United States "pending the disposition of the motion for preliminary injunction * * *". On August 27, 1956, the District Court upon consideration of the complaint, the preliminary injunction motion with attached affidavit, the opposition thereto, the immigration file relating to appellant, and argument by counsel concluded that appellant was deportable as an alien visitor on business who had remained in the United States for a longer period of time than authorized (App. 34-35). The District Court denied appellant's motion for preliminary injunction by an order dated August 27, 1956 and filed August 30, 1956. Appellant filed a timely notice of appeal "from the order of this court [the District Court] entered on the 30th day of August, 1956 in favor of defendant [appellee] against plaintiff [appellant]."

B. Administrative Proceedings.

Immigration file A8839363 relating to Manuel Joao Coelho discloses essentially the following facts. Appellant was charged with being an alien who at the time of his entry into the United States on July 15, 1955 was not in possession of a valid visa and

² Immigration file A8839362 relating to Manuel Joao Coelho bears a stamp showing it was filed in the District Court on August 24, 1956, and it is a part of the record on appeal.

was therefore deportable under the Immigration and Nationality Act of 1952 (Immig., Hearing, p. 2).³ On March 16, 1956, a deportation hearing was held before a Special Inquiry Officer at which hearing appellee, his counsel and an interpreter were present (Immig., Hearing p. 1). Appellant's counsel addressed certain inquiries to the Special Inquiry Officer concerning his appointment and the identity of his supervisor (Immig., Hearing p. 2, 3, 4). The Special Inquiry Officer stated (Immig., Hearing p. 3):

"I shall make only one statement * * * I have been appointed a Special Inquiry Officer by the Commissioner of the Immigration and Naturalization Service pursuant to the Immigration and Nationality Act. I will answer no further questions and make no further statements with respect to my authority or right to conduct the proceedings.

COUNSEL. That is why I respectfully object to the conduct of these proceedings by you on the ground that there is no specific authority in the Immigration and Nationality Act for the appointment of Special Inquiry Officers. I also object to the conduct of these proceedings by you on the ground that you have not been appointed to act as a hearing examiner under the Administrative Procedure Act."

The objection by appellant's counsel was overruled.

The warrant issued by the Immigration and Naturalization Service for the arrest of appellant for being in the United States in violation of law was received in evidence as Exhibit 1, although appellant objected on the ground that the officer who had served the warrant should have been present. (Immig., Hearing, p. 2). The warrant of arrest showed upon its face that it had been issued on November 2, 1955, and that it had been served upon appellant in Buffalo, New York on November 2, 1955, and at that time appellant had been informed through an interpreter of the cause for his arrest (Immig., Ex. 2). A

³ References in this brief to Immigration file A8839362 shall be denoted by the use of Immig. It has no continuous pagination.

"Form 257", a documentary record of an alien's entry into the United States, was introduced to show that appellant had been admitted at New York on July 15, 1955, as a non-immigrant for business purposes, for a period of 15 days and that appellant's authorized stay had been extended until October 2, 1955. This "Form 257" was received in evidence and marked Exhibit 2, although appellant's counsel objected on the ground that it had been taken from appellant without a warrant. (Immig., Hearing p. 6, Ex. 2).

The Special Inquiry Officer showed appellant a sworn statement appearing on its face to have been made by appellant on November 1, 1955, to Immigration officers and asked appellant if he had signed such document. Appellant's counsel objected on the ground that it was improper for the Government to require appellant to identify the statement (Immig., Hearing p. 6). The objection was overruled, and appellant acknowledged that he had made this statement to an immigrant inspector but that he had not been able to understand the immigrant inspector who had spoken to him in Spanish. The Special Inquiry Officer asked appellant to review this statement with the assistance of the Portugese interpreter present and point out any incorrect answers therein (Immig., Hearing p. 7). Appellant referred to item 10 of the statement and testified he did not remember having stated there that he intended to stay in the United States as long as he possibly could. He referred to item 15 of the statement and testified he did not know the requirements of the Alien Registration Act of 1940, although he had stated there that he did know. The sworn statement made by appellant on November 1, 1955, was received in evidence and marked as Exhibit 3 subject to the explanations of appellant. (Immig., Hearing p. 8). Exhibit 3 shows upon its face that it is a record of a sworn statement made in Spanish by appellant to Immigrant Inspector Bundy concerning appellant's status in the United States. Appellant stated therein that it was made voluntarily. Appellant also stated therein that he was a native and citizen of Portugal who came into the United States on July 15, 1955, on a visitor's visa.

The Special Inquiry Officer lodged a new charge against appellant that he was subject to deportation pursuant to Section 241(a)(2) of the Immigration and Nationality Act of 1952 in that after being admitted to the United States as a business visitor under Section 101(a)(15)(B) of the 1952 Act he had remained in the United States for a longer period than authorized. Appellant stated that he understood this charge lodged against him and appellant's attorney stated that he would not need an adjournment or any additional time for the purpose of meeting the new charge. (Immig., Hearing p. 8).

The Special Inquiry Officer received in evidence and marked as Exhibit 4 a letter appellant admitted having written to the Immigration and Naturalization authorities at Buffalo, in which he acknowledged receipt of a notice to appear before an Examiner on December 8, 1955, and he requested permission to depart voluntarily from the United States rather than appear at the hearing. The Special Inquiry Officer received in evidence and marked as Exhibit 5 a "Form I-539" application for extension of time of temporary stay, which application appellant acknowledged having executed on July 26, 1955. Appellant objected to the admission into evidence of these exhibits on the ground that he was being examined before the Government presented any witnesses. Such objections were overruled. (Immig., Hearing pp. 9-10).

Before appellant's counsel examined appellant, the following colloquy took place between appellant's counsel and the Special Inquiry Officer (Immig., Hearing pp. 11-12):

"THE SPECIAL INQUIRY OFFICER. Well, it is my ruling that all questions relating to the illegality of arrest, in and of itself, is immaterial and will be excluded. However, I shall permit questions which are designed especially to establish that any of the actions of the respondent [appellant] in his dealings with immigration officers were involuntary. Do you understand the nature of my ruling?

THE ATTORNEY. Yes, sir. I presume, sir, that your ruling would cover any question of voluntary action on his part from the moment when he was taken into cus-

tody and arrested up until—covering the exclusion of those documents.

THE SPECIAL INQUIRY OFFICER. I wish to point out that the mere fact, if established that his arrest was illegal, that fact is irrelevant to these proceedings, but you may question the respondent [appellant] regardless of the illegality of the arrest, to establish that any actions on his part if dealing with service officers, were involuntary."

Appellant testified that he had been "first arrested" by Immigration officers in Silver Creek, New York (Immig., Hearing p. 11). He did not state the date. There were two officers, one of whom was an immigration officer and who asked appellant in Spanish for his papers. When appellant stated that he did not have his papers with him, the officer said: "Let us go to your house." Appellant testified that he would not have gone to his house had they not been officers and had they not ordered him to go. (Immig., Hearing p. 12-13). At his house, appellant took from his suitcase certain papers and gave them to the officers. These papers were Portuguese documents which included his passport, his identity card, his military identity card and a certificate of the criminal register. At the deportation hearing, appellant was shown Ex. 2 (the "Form 257" which showed his date of entry into the United States) and was asked if he had given that document to the officers. Appellant testified: "I cannot remember. I am not sure, but I believe that that paper was together with my passport" (Immig., Hearing p. 13).

Appellant testified that one of the officers wore a uniform and carried a pistol. Appellant testified that he did not give up the papers voluntarily and that he was afraid. (Immig., Hearing p. 13-14). Appellant testified that no Immigration Officer threatened him with any offer of violence or laid hands upon him (Immig., Hearing p. 20). The officers did not show appellant a warrant for his arrest or a search warrant. Appellant testified that after the officers had taken the documents, he was taken to Buffalo. (Immig., Hearing p. 14). Appellant returned to his home that night and went back to the office in Buffalo the next day (Immig., Hearing p. 14). The warrant for appellant's ar-

rest showed upon its face that it was served on appellant on November 2, 1955, at Buffalo, New York (Immig. Ex. 1).

The Special Inquiry Officer asked appellant whether he had arrived in the United States at the port of New York on July 15, 1955, with a visitor's visa (Immig., Hearing p. 17). Appellant's counsel objected to the question on the grounds that (1) it was not a proper question for cross-examination and (2) it was a question relating to documents illegally seized by the immigration officers in violation of the fourth and fifth amendments. Appellant's objection was overruled and appellant stated an affirmative answer to the Special Inquiry Officer's question. (Immig., Hearing p. 17). Appellant stated, in answer to questions by the Special Inquiry Officer, that his application for an extension of his temporary stay had been granted until October 2, 1955, and that he had not received any further extension of his stay beyond October 2, 1955 (Immig., Hearing pp. 19-20).

On March 16, 1956, the Special Inquiry Officer made findings of fact and conclusions of law that appellant was not subject to deportation upon the charge contained in the warrant of arrest but was deportable upon the charge lodged at the deportation hearing, in that appellant had been admitted as a business visitor and had remained beyond the time authorized. The privilege of voluntary departure was granted appellant. (Immig., Decision of Special Inquiry Officer, March 16, 1956, p. 2).

Appellant noted an appeal with the Board of Immigration Appeals which rendered its decision on May 25, 1956. The Board noted appellant's contention that his "Form 257" showing the date of his arrival in the United States had been obtained by illegal search and seizure. The Board pointed out that this document had been voluntarily handed over by appellant to Immigration Officers and that appellant admitted that he had not been threatened with violence. The Board also noted that it was not clear from the administrative record that appellant had given this document to the officers since appellant had been certain only that he had given over all of his Portuguese documents. The Board also ruled that the

officers had the authority under the 1952 Act to question appellant as to his right to be or remain in the United States. The Board noted appellant's objection to admission into evidence of Exhibit 3—his sworn statement. The Board pointed out that the two items in his statement, to which appellant had objected specifically, were irrelevant to the deportation charge. The Board also pointed out that appellant's deportability was established by his own testimony without reference to the Exhibits to which he had objected. The Board concluded that the deportation hearing had been fair and in compliance with the statute and regulations and that appellant's deportability was established by the testimony adduced at the hearing. The Board dismissed appellant's appeal and gave appellant until August 18, 1956, to make his voluntary departure. (Immig., Decision of the Board of Immigration Appeals, May 25, 1956). On August 16, 1956, appellant filed his complaint in the District Court (App. 27).

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portions of the Immigration and Nationality Act of 1952, ch. 477, title II, ch. 5, 66 Stat. 163 et seq., 8 U. S. C. § 1101 et seq. (1952) are as follows:

“§ 101 (a) (15) (b). The term immigrant means every alien except an alien who is within one of the following classes of non-immigrant aliens—an alien * * * having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure * * *

* * *

§ 241 (a) (2). Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who * * * is in the United States in violation of this Act or in violation of any other law of the United States * * *

* * *

§ 242 (b). A Special Inquiry Officer shall conduct proceedings under this section to determine the deport-

ability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witness * * * Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present. * * * Proceedings before a special inquiry officer * * * shall be in accordance with such regulations * * * as the Attorney General shall prescribe. Such regulations shall include requirements that—(1) the alien shall be given notice * * * of the nature of the charges against him * * * (2) the alien shall have the privilege of being represented * * * by * * * counsel * * * (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.

§ 287 (a) (1). Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant * * * to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *

§ 291. * * * In any deportation proceeding * * * against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States * * * If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law."

2. The pertinent portions of 8 C. F. R. § 242 (1952) are as follows:

"§ 242.11 *Investigations*—(a) *Persons Believed to be Subject to Deportation*. The case of every person be-

171
K
New
1
step

lieved to be subject to arrest and deportation shall be investigated by such officer as may be necessary for that purpose.

(b) *Purpose of Investigation.* The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably established that the person investigated is an alien and that he is subject to deportation.

(c) *Recorded Statements.* Whenever, in the course of an investigation, information is obtained which indicates that the person investigated is subject to arrest and deportation, and it is desired to use such information as evidence in support of an application for a warrant of arrest, such information shall be reduced to writing either in narrative or question-and-answer form and signed by the person furnishing the information. Whenever such recorded statement is to be obtained from any person, the investigating officer shall (1) identify himself to such person, (2) warn the person that any statement made by him may be used as evidence against him in any subsequent proceeding, and (3) place the person under oath or affirmation.

* * * * *

§ 242.13 *Issuance of Warrants of Arrests.* Any officer * * * who receives an application for a warrant of arrest may issue such warrant in any case in which he determines that a prima facie case for deportation has been established.

§ 242.14 *Execution of Warrants of Arrests—(a) Service.* Except as provided in § 242.34, an alien against whom a warrant of arrest has been issued shall be taken into custody under the authority of the warrant of arrest, or if previously taken into custody without a warrant of arrest under the authority contained in § 287 of the Immigration and Nationality Act, shall be continued in custody under the warrant of arrest subsequently issued unless his release is authorized. In either case a copy of the warrant of arrest shall be served upon

the alien, and he shall then be fully advised of the cause of his arrest * * *

* * * *

§ 242.41 *Voluntary Departure Prior to Commencement of Hearing; Procedure.* Any alien, other than an alien prima facie deportable under § 242 (f) of the Immigration and Nationality Act, who believes himself to be eligible for voluntary departure under § 242 (b) of the said Act may apply therefor at an office of the Service at any time prior to the commencement of the hearing under a warrant of arrest in his case. The District Director or officer in charge having administrative jurisdiction over the office receiving an application for voluntary departure may cause such investigation to be conducted as he deems necessary to determine whether the relief in question should be granted. * * *

* * * *

§ 242.53 *Conduct of Hearing—(a) Special Inquiry Officer; General Powers.* The special inquiry officer assigned to conduct the hearing under this part shall have the authority to: (1) administer oaths and affirmations; * * * (3) conduct the hearing, present and receive evidence, and rule upon all objections to the introduction of evidence or motions made during the course of the hearing; * * *

(b) *Special Inquiry Officers; General Duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial, and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious.

* * * *

(d) *Special Inquiry Officers, Additional Charges.* If it appears during the hearing that the respondent may be deportable on charges other than or in addition to those contained in the warrant of arrest or in the notice of hearing, the special inquiry officer * * * may lodge additional charges against the respondent and shall de-

velop evidence upon such charges in like manner as on the charges contained in the warrant of arrest or notice of hearing. When additional charges are lodged, the special inquiry officer shall explain these charges to the respondent in simple, understandable language and shall advise him, if he is not represented by an attorney or other qualified representative, that he may be so represented if he desires, and require him to state then and there for the record whether he desires such representation. The special inquiry officer shall also inform the respondent that he may have a reasonable period of time within which to meet the additional charges, if he desires, and require him to state then and there whether he desires such additional time. * * *

* * * * *

§ 242.54 (b) *Use of Prior Statements.* The special inquiry officer may enter of record any statement, oral or written, which is material and relevant to any issue in the case, previously made by the respondent or any other person during any examination, investigation, or hearing. If objection thereto is made by the alien or his counsel or representative, the reasons for the objection, as well as the ruling thereon by the special inquiry officer shall be made a part of the record."

SUMMARY OF ARGUMENT

1. This Court can wholly dispose of the instant case on the merits although this is an appeal from the denial of appellant's motion for preliminary injunction. The Special Inquiry Officer was justified in refusing to answer questions about the identity of his supervisor in view of the decision in *Marcello v. Bonds*, 349 U. S. 302 (1955). The appointment of the Special Inquiry Officer by the Commissioner of Immigration and Naturalization was authorized by section 103 of the Immigration and Nationality Act of 1952.

2. The transcript of proceedings at the deportation hearing reveals that appellant testified fully as to the events leading to his arrest by immigration officers and their testimony would have been merely cumulative. Appellant expressly identified

the warrant for his arrest received in evidence at the deportation proceeding as being the warrant served upon him. The immigration officers had statutory authority to take appellant into temporary custody for the purpose of questioning him as to his right to be or remain in the United States and his subsequent arrest was concededly effected under a warrant. Appellant's record of date of entry, if it left the possession of appellant at all and came into possession of the immigration officers, was given voluntarily since no physical coercion or threats were directed against him.

Appellant's sworn statement to the immigrant inspector as a result of the questioning as to his right to be in the United States was properly considered by the Special Inquiry Officer because appellant's objections were to portions of the statement that were entirely irrelevant to the deportation charge. Either appellant's own testimony at the deportation hearing or other exhibits admitted in evidence were sufficient to establish his deportable status and consequently the Special Inquiry Officer's decision was based upon reasonable, substantial and probative evidence.

ARGUMENT

I

The Special Inquiry Officer's Refusal To Reveal the Identity of His Supervisor Was Not Error and His Appointment by the Commissioner Is Authorized by Statute.

This appeal is taken from a denial by the District Court of appellant's motion for preliminary injunction restraining appellee from deporting appellant. Appeals may be taken from certain interlocutory orders, including the denial of a preliminary injunction, pursuant to 28 U. S. C. § 1292 (2) (1952). A motion for preliminary injunction seeks to maintain the status quo pending the hearing and determination of a case on the merits.* The granting or denying of such motion is dependent upon the sufficiency of the showing of imminent irreparable

* It may be noted that the status quo in the instant case has already been fixed and will be maintained pending disposition of appeal by virtue of this Court's order on October 17, 1956 staying appellant's deportation pending hearing and decision in this appeal.

injury to the movant, the probability of the ultimate success or failure of the suit, and the balancing of the right asserted against the act sought to be enjoined. *Embassy Dairy v. Camalier*, 93 U. S. App. D. C. 364, 367, 211 F. 2d 41 (1954). The grant or denial of such motion by a district court may be upset on appeal only if there has been a clear abuse of discretion. *Cox v. Democratic Central Committee of the District of Columbia*, 91 U. S. App. D. C. 416, 200 F. 2d 356 (1952). However, appellate courts may on interlocutory appeals consider and decide cases on the merits and thus terminate litigation where it is clear from the complaint that the movant cannot succeed on his cause of action. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 525 (1897); *Deckert v. Independence Corp.*, 311 U. S. 282, 287 (1940); *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136, 141 (1920); *Johnson v. Stevenson*, 170 F. 2d 108, 111 (5th Cir. 1948). It is submitted that the allegations of the complaint, when read with the transcript of the deportation hearing contained in the Immigration file relating to appellant, show clearly that appellant is not entitled to the relief he seeks, and, therefore, this Court can dispose of the instant case by a decision on the merits and a subsequent order of dismissal.

At the outset, appellant contends that the Immigration file relating to appellant was not before the District Court and therefore its consideration by that court in denying appellant's motion for preliminary injunction was error. This contention is wholly refuted by the record and is totally without merit. Appellant filed in the District Court his complaint for declaratory judgment and injunctive relief and, on the same date, filed his motion for preliminary injunction "upon the grounds and in accordance with the averments set forth in the complaint". On August 24, 1956, the record reveals, appellee filed his opposition to appellant's preliminary injunction motion and stated in such opposition: "*Attached hereto and made a part hereof is the file of the Immigration and Naturalization Service (File No. A-8839362) relating to plaintiff [appellant] herein.*" [Emphasis supplied.] Thus, the Immigration file relating to appellant was a part of appellee's opposition below and was therefore a part of the pleadings. See F. R. Civ. P. 10 (c). The Immigration file relating to appellant, which

bears the file stamp of the District Court, was an exhibit properly before the court and was properly considered by it in denying appellant's motion for preliminary injunction.

Prior to discussing appellant's other contentions concerning alleged procedural defects in the deportation hearing, the substantive grounds for appellant's deportability should be stated. The Special Inquiry Officer, after the deportation hearing, found that appellant is a native and citizen of Portugal who in July, 1955 was admitted into the United States as an alien visitor on business for a limited period of time and who obtained an extension of his stay until October, 1955 but remained in the United States beyond the expiration of that extension. The Special Inquiry Officer concluded appellant was deportable pursuant to section 241 (a) (2) of the Immigration and Nationality Act of 1952—which provides for the deportation of any alien who is in the United States in violation of law—in that appellant remained in this country beyond the time for which he had been admitted. Since appellant admitted at the deportation hearing all the above facts necessary to constitute him deportable under the Act of 1952, appellant has at no time challenged, nor could he challenge, the Special Inquiry Officer's conclusion. Appellant contents himself rather with procedural sniping at the administrative proceedings.

Appellant urges that the Special Inquiry Officer erred at the deportation hearing by refusing to answer appellant's questions inquiring as to the extent of control exercised over the Special Inquiry Officer by the District Director (Br. Argument II). Appellant is foreclosed from successfully raising this issue by the decision of the Supreme Court in *Marcello v. Bonds*, 349 U. S. 302 (1955). In *Marcello*, an alien, convicted in 1938 of violating the Marihuana Tax Act, had been ordered deported. The validity of the deportation order was challenged in a habeas corpus proceeding in which the alien alleged, *inter alia*, that the deportation hearing held under Section 242 (b) of the Immigration and Nationality Act of 1952 failed to comply with the requirements of the Administrative Procedure Act in that the special inquiry officer was under the supervision and control of officials in the Immigration Service who performed investigative and prosecuting functions. The alien

also alleged that Section 242 (b) violated the fifth amendment because it failed to provide for a fair and impartial hearing. The alien argued to the Supreme Court that where the Immigration and Nationality Act of 1952 differed from the Administrative Procedure Act the provisions of the latter should govern, and the alien pointed to Section 5 (c)—the “separation of functions” provision—of the Administrative Procedure Act as differing significantly from the procedures set forth by Section 242 (b). The alien showed that Section 5 (c) provided that hearing officers shall not be responsible to or under the supervision of those engaged in investigation and prosecution, whereas the special inquiry officers, charged under Section 242 (b) with conducting deportation hearings, were subject to the supervision of not only district directors of the immigration districts but also of higher service officials. All such officials had investigative and enforcement responsibilities. Thus, the alien’s argument in the Supreme Court was directed against the supervision of the special inquiry officer by investigative and prosecuting officials of the Service. *Marcello v. Bonds, supra*, at 305–306. However, the Supreme Court said (at p. 306): “For the sake of clarity, we shall consider all of the differences in the hearing provisions of the two Acts in determining whether the Administrative Procedure Act is to govern.” The Supreme Court concluded that the Act of 1952 expressly superseded the hearing provisions of the Administrative Procedure Act and that the fact that a special inquiry officer is subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions does not so strip a deportation hearing of fairness and impartiality as to make the hearing procedures set forth by Section 242 (b) violative of the fifth amendment.

Thus, it may be seen in the instant case that the information sought at the deportation hearing by appellant from the Special Inquiry Officer as to the extent of control exercised over him by the District Director was absolutely irrelevant in view of the Supreme Court’s decision in *Marcello* upholding the administrative decision that an alien was deportable, although such decision of deportability was rendered by a Special Inquiry Officer clearly shown to have been under the supervision of a

district director and of even higher Service officials. In the instant case, appellant can scarcely contend with success that he was denied a fair hearing and due process by the Special Inquiry Officer forbidding inquiry into the extent of control over him exercised by the District Director when the Supreme Court has decided in *Marcello* that the control of a Special Inquiry Officer by Service officials having investigative and enforcement functions does not so strip a deportation hearing of fairness and impartiality as to violate due process.

Appellant also questions the authority of the Special Inquiry Officer to have conducted the deportation hearing in view of the fact that he had been appointed to his position by the Commissioner of Immigration and Naturalization. (Br. Argument V). The Attorney General is authorized by Section 103 (a) of the Immigration and Nationality Act of 1952 to "appoint such employees of the Service as he deems necessary". The Commissioner of Immigration and Naturalization pursuant to Section 103 (b) of that Act is "charged with any and all responsibilities and authority in the administration of the Service and of this Act which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General." 8 C. F. R. § 9.1 (b) provides: "*The Commissioner may designate, select, and appoint as a special inquiry officer any immigration officer whom he deems specifically qualified * * **". Consequently, it is clear that the Special Inquiry Officer's appointment by the Commissioner was valid and that the Special Inquiry Officer had specific authority under Section 242 (b) of the Act of 1952 to conduct the deportation hearing.

II

Appellant's Arrest by Immigration Officers Was Not Illegal and the Decision by the Special Inquiry Officer Was Based Upon Reasonable, Probative and Substantial Evidence

Appellant contends that the Special Inquiry Officer erroneously refused to permit him to testify as to his alleged illegal arrest by the immigration officers, erroneously failed to call the arresting immigration officers, to testify concerning this

alleged illegal arrest, and erroneously admitted into evidence at the deportation hearing the warrant for appellant's arrest without identification. (Br. Argument II). An examination of the proceedings at the deportation hearing, contained in the Immigration file, reveals that appellant was examined about and testified to his arrest in some detail (Immig., Hearing pp. 11-14). His testimony commenced with a description of his initial contact with the immigration officers, continued through his being taken into custody for questioning and ended with his arrest under a warrant and his subsequent release on bond. His testimony narrated events occurring during a period of two days. It cannot be shown that appellant's testimony concerning the manner of his arrest was cut off or restricted by the Special Inquiry Officer in any way. In view of appellant's testimony at the deportation hearing as to the events surrounding his arrest, any testimony by the immigration officer would merely have been cumulative and not necessary to support the Special Inquiry Officer's decision. *Diogo v. Zimmerman*, C. A. No. 16680 (E. D. Pa. 1956) (App. 39). Furthermore, it is difficult to understand in what way appellant was prejudiced by the failure of the immigration officers to corroborate appellant's own testimony. Appellant complains that the warrant issued for his arrest, and served upon him on November 2, 1955, was received in evidence yet never identified at the deportation hearing. Testimony at the deportation hearing was to the contrary. Appellant acknowledged that a copy of the warrant of arrest was delivered to him on or about November 2, 1955 (Immig., Hearing p. 1), and this fact of service is corroborated by the file and date stamp on the warrant itself (Immig., Hearing p. 2, Ex. 1).

Appellant next contends that he was arrested by the immigration officers without a warrant under circumstances in which the Immigration and Nationality Act of 1952 does not permit an arrest without warrant, and appellant complains that documents were taken from him without a search warrant (Br. Argument III). Appellant has misread that Act. Section 287 (a) (1) provides:

"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall

have power without warrant * * * to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *"

This section of the Act of 1952 has been held constitutional. *United States v. Correia*, 207 F. 2d 595 (3d Cir. 1953). Consequently, the immigration officers were acting pursuant to law when, without a warrant, they took appellant into temporary custody on November 1, 1955 for the purpose of interrogation as to his suspected alien status in the United States. It is important to note that such custody was temporary only since appellant was released the same day and he returned from the Service offices at Buffalo to his home. The next day, November 2, 1955, appellant was arrested *with a warrant* by the immigration authorities at Buffalo, but released on \$1,000.00 bond after the deportation charge against him had been explained to him (Immig., Ex. 1, Hearing p. 14). It is clear that the immigration officers were following the standard operating procedure provided for by section 287 (a) (1) and the regulations prescribed thereunder. 8 C. F. R. § 242.11 (1952) provides for an investigation to be made by the proper immigration officer of every person believed to be subject to arrest and deportation in order to determine whether there exists credible evidence that the investigated person is a deportable alien. 8 C. F. R. § 242.14 provides:

"* * * [A]n alien against whom a warrant of arrest has been issued shall be taken into custody under the authority of the warrant of arrest, or if previously taken into custody without a warrant of arrest under the authority contained in § 287 of the Immigration and Nationality Act, shall be continued in custody under the warrant of arrest subsequently issued unless his release is authorized." [Emphasis supplied.]

It is clear from the above that appellant was not arrested on November 1, 1955, without warrant, as appellant contends, but rather that he was taken into temporary custody for questioning pursuant to the authority conferred by Section 287 (a) (1). *Tsimounis v. Holland*, 132 F. Supp. 754, 757 (E. D. Pa., 1955), *aff'd.*, 228 F. 2d 907 (3d Cir. 1956). Appellant's subsequent

arrest the next day was made on a warrant and is not challenged here.

Appellant's contention that documents were illegally taken from him by the immigration officers at the time they took him into custody for questioning can scarcely stand in view of the fact that under Section 287 (a) (1) the alleged "arrest" was authorized. But more important is appellant's own testimony at the deportation hearing that he gave the documents to the immigration officers without hesitation or protest. Although appellant testified that he was afraid when he handed over the documents to the immigration officers, he admitted that the officers had at no time threatened him or used any physical coercion. The seizure of the documents was not illegal since they were voluntarily given up by appellant according to his own testimony. See *Diogo v. Zimmerman, supra*. Furthermore, the four documents appellant was positive *he had given* to the immigration officers were *Portuguese government* documents which at no time figured in the administrative proceedings herein—either before or at the deportation hearing. Appellant was not at all sure that the document showing the date of his arrival in the United States—his "Form 257" which was received in evidence at the deportation hearing as Exhibit 2—had been among the documents he had given the immigration officers (Immig., Hearing p. 5, 13).

Appellant contends that the decision of the Special Inquiry Officer—that appellant was deportable—was not based upon reasonable, substantial and probative evidence, as required by section 242 (b) (4), but upon the record of arrival (Ex. 2), illegally seized, and the sworn statement (Ex. 3), improperly introduced (Br. Argument IV). As pointed out above, it is not clear that appellant's record of arrival was among those documents given by appellant to the immigration officers on November 1, 1955. Assuming *arguendo* it was one of the documents, it was given voluntarily and not seized. As to the sworn statement, in which statement appellant stated he made it voluntarily and with knowledge it could be used against him in a deportation proceeding, appellant's only allegations are that he had not understood two of the questions and that consequently his answers had been inaccurate and that the immi-

gration officers copied information into this statement from his record of arrival (Ex. 2). The two questions which he alleged he had not understood had no bearing whatsoever on the deportation charges and consequently he could not possibly have been prejudiced by his answers thereto in the statement (Immig., Hearing p. 7, 8). The transcript of the deportation hearing reveals further that appellant's record of arrival (Ex. 2) was used by the immigration officers to supplement his sworn statement only to the extent of copying the names of appellant's wife and children (Immig., Hearing p. 16). This action cannot be deemed prejudicial to appellant. But again, in any event, appellant's deportability does not depend upon the admissibility or inadmissibility of this statement (Ex. 3), nor upon the introduction into evidence of appellant's record of arrival in this country (Ex. 2). Appellant's own testimony at his deportation hearing firmly establishes his deportable status (Immig., Hearing pp. 18-20) and all other evidence, while independently probative and sufficient to sustain deportation, is merely cumulative.

Appellant's contention that the Special Inquiry Officer exceeded the scope of direct examination in his cross-examination of petitioner is totally without merit. Section 242 (b) of the 1952 Act expressly grants to the Special Inquiry Officer the right to cross-examine and, in inquiring of appellant as to his arrival, status and stay in the United States, the Special Inquiry Officer did not exceed the scope of direct examination wherein questions concerning the exhibits in evidence had been asked. Assuming *arguendo*, however, that the scope of direct examination was exceeded, the hearing would not be vitiated so long as reason and fairness obtained. *Bilokumsky v. Tod*, 263 U. S. 149, 157 (1923).

In conclusion, it should be noted that two other exhibits were received in evidence at the deportation hearing which were in and of themselves substantial, reasonable and probative evidence and sufficient to support the Special Inquiry Officer's decision that appellant was deportable. See *Navarrette-Navarretta v. Landon*, 223 F. 2d 234, 237 (9th Cir. 1955). Exhibit 4 is a written request by appellant to the Service office at Buffalo for permission to depart voluntarily prior to the

commencement of the deportation hearing. See 8 C. F. R. § 242.41 (1952). Appellant thus admitted his own status as a deportable alien unlawfully in the United States. Moreover, Exhibit 5, received in evidence at the deportation hearing and such receipt not challenged on appeal, is a printed form entitled: "Application to Extend Time of Temporary Stay" (Immig., Ex. 5). In this application, executed by appellant on July 26, 1955, appellant states that (1) he is a citizen of Portugal (2) he came to the United States as a "commercial visitor" (3) he was admitted into the United States on July 15, 1955 for a period of 15 days (4) he intended to depart on September 30, 1955 and (5) he requests an extension of stay for two months. The information set forth, without more, established the fact that appellant was an alien in the United States who had been admitted temporarily on business and raised the presumption that appellant had overstayed his leave in this country. Appellant introduced no evidence to the contrary. See 8 U. S. C. § 1361 (1952). It is submitted that the Special Inquiry Officer's decision that appellant was a deportable alien is overwhelmingly supported by reasonable, substantial and probative evidence.

CONCLUSION

Wherefore, it is respectfully submitted that the order of the District Court from which appellant appeals be affirmed and the District Court be directed to dismiss the complaint.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
EDWARD O. FENNELL,
JOHN W. KERN III,
Assistant United States Attorneys.

